

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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* CA NO. 15-419-WES

MARKHAM CONCEPTS, INC.,
SUSAN GARRETSON, and
LORRAINE MARKHAM,
individually and in her
capacity as Trustee of
the Bill and Lorraine
Markham Exemption Trust
and the Lorraine Markham
Family Trust

VS.

* MARCH 6, 2018

HASBRO, INC., REUBEN
KLAMER, THOMAS FEIMAN,
ROBERT MILLER, MAX
CANDIOTTY, DAWN
LINKLETTER GRIFFIN,
SHARON LINKLETTER,
MICHAEL LINKLETTER, LAURA
LINKLETTER RICH, and
DENNIS LINKLETTER

* PROVIDENCE, RI

* * * * *

BEFORE THE HONORABLE WILLIAM E. SMITH

Chief JUDGE

(BENCH TRIAL - VOLUME IV)

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DEFENSE WITNESS

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DEFENDANT

FOR ID

FULL

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1 6 MARCH 2018 -- 9:00 A.M.

2 PHILIP EDWARD ORBANES, DEFENSE WITNESS,

3 RESUMES THE STAND

4 THE COURT: Good morning, everyone. So we're
5 ready to proceed with the continued examination of the
6 witness.

7 MR. KRUMHOLZ: Yes, your Honor, but just a
8 little housekeeping first. So we need to formally
9 admit HTX15, which is a physical game with a different
10 version with a 1960 copyright date, and HTX17, which is
11 also a physical game of The Game of Life with a 1960
12 copyright date with, again, a different version. Per
13 your practice or your requests in November we have, in
14 lieu of leaving the games with the Court, we have put
15 in photographs as placeholders and we'll hold on to
16 those games.

17 THE COURT: I think that's a good idea. All
18 right.

19 Is there any objection?

20 MR. POLLARO: No objection. I assume we've got
21 all five of those in. We just want to make sure all
22 five are in.

23 MR. KRUMHOLZ: Yes, all five are in. The other
24 three --

25 MR. POLLARO: We had two yesterday and two

1 today, so I don't know if we're missing one.

2 MR. KRUMHOLZ: Well, no, the first one got put
3 in back in November.

4 MR. POLLARO: All right. Then no objection.

5 MR. KRUMHOLZ: All five are in.

6 THE COURT: All right.

7 MR. KRUMHOLZ: We have agreement on the
8 demonstratives so we left you the two copies there that
9 are now marked. We have HTX112 is the demonstrative
10 set that has the box covers and the boards, and HTX113
11 you should have a copy of, your Honor, that's got the
12 game rules as the demonstratives.

13 THE COURT: I do have both of those, so the box
14 covers are HTX112, and the rules are -- what's the
15 number?

16 MR. KRUMHOLZ: HTX113.

17 THE COURT: 113. Very good.

18 MR. KRUMHOLZ: And we are ready to proceed.

19 THE COURT: All right. Very good.

20 (Defendant's Exhibit HTX15 was admitted in full)

21 (Defendant's Exhibit HTX17 was admitted in full)

22 (Defendant's Exhibit HTX112 was admitted in
23 full)

24 (Defendant's Exhibit HTX113 was admitted in
25 full)

1 THE COURT: Good morning, Mr. Orbanes.

2 THE WITNESS: Good morning, your Honor.

3 THE COURT: You may inquire.

4 MR. KRUMHOLZ: Thank you.

5 DIRECT EXAMINATION BY MR. KRUMHOLZ (CONTINUES):

6 Q. So Mr. Orbanes, I want to continue on with the
7 comparison and the analysis that you did and now
8 shifting over to some of the other versions of the game
9 that you looked at. Okay?

10 A. I understand.

11 Q. And did you, at our request, perform an analysis
12 comparing the prototype to a version of the game that
13 has a copyright of 2015?

14 A. I did.

15 MR. KRUMHOLZ: And I will state for the record
16 that that's already been introduced as HTX19 and
17 already admitted.

18 Q. If you turn to page 11 of what is now HTX112,
19 which is the demonstrative with the covers and the
20 boards, and I'll represent that those are the two board
21 covers for JTX509 and HTX19, and I've also put those on
22 the -- the posters of the same on the easels there.

23 Do you recognize those two covers as the cover
24 on the left of the prototype and the cover on the right
25 for what I'll refer to as the "new game"?

1 A. I do.

2 Q. Now, before we get into the detail of your
3 comparison, let me just ask some preliminary questions.
4 In your experience, as a popular game like The Game of
5 Life starts to age, what typically happens? What does
6 a game manufacturer do?

7 A. If a game whose popularity is connected with
8 something that's going on in society or has a
9 fashionable element, it can obsolete itself so the
10 sales of the product will begin to decline as the
11 interest in society changes.

12 By the way, just one thing that I realized is
13 that when The Game of Life came out one of the most
14 talked about topics in the country was the coast to
15 coast, the interstate highway system, and I remember in
16 school in particular we were reading about this in
17 Weekly Reader and publications at the time, so the idea
18 of long highway trip was very fashionable in 1959, but
19 that became more commonplace as time went on, and, in
20 particular, a lot of the elements that were liked in a
21 particular era could become commonplace as time goes
22 on, which means the appeal of the game starts to
23 diminish somewhat.

24 So to answer your question, what a manufacturer
25 does is to see can this game be updated, is it

1 possible. An example is the comparable game to The
2 Game of Life is the game of Careers, which came out two
3 years earlier in the height of the space race. It was
4 a very popular theme in 1957, but by 1965 the game was
5 on life support until it was updated to include careers
6 that were more of interest.

7 So in the case of The Game of Life, what I would
8 imagine happened is as time went on Milton Bradley had
9 to challenge its design team to refresh it, to change
10 elements of the game to keep it of interest to
11 consumers.

12 **Q.** How does a company like Hasbro or Milton Bradley
13 do that?

14 **A.** Well, nowadays there's a marketing department
15 that's conducting lots of research, it knows trends, it
16 knows what buzz words kids like, and it will offer that
17 information to help designers to update a game.

18 Back in the 1960s and into the 70s the sales
19 department would have played a bigger role in that
20 because they simply would have come back and said, you
21 know, the game looked old compared to what's around it
22 now on the shelves.

23 **Q.** So looking at the covers for the prototype versus
24 what we've been calling the new game, is the new game's
25 cover consistent with a manufacturer's attempt to keep

1 a game fresh?

2 A. Yes, it is.

3 Q. How so?

4 A. One of the most significant comparisons that I can
5 make is that the concept of The Game of Life in 1959
6 apparently did not need to have a background
7 illustration to bring that theme to life, but by 19 --
8 pardon me, by 2015 the Milton Bradley marketing and
9 graphic people felt that they really had to enliven and
10 create immediacy in recognizing just what was The Game
11 of Life by incorporating this rather lively scene of
12 elements that most likely are incorporated into the new
13 game.

14 Q. So did you do a comparison of the board game
15 covers?

16 A. I did.

17 Q. What similarities, if any, did you see?

18 A. Well, there's really one, and that is the title.
19 But even the title is in a completely new styling.
20 It's a new logo type. It doesn't carry over this very
21 nice but probably dated idea of four suspended letters.
22 Otherwise everything on the cover of the new package is
23 different from the prototype.

24 Q. And do you understand The Game of Life to be a
25 Hasbro trademark?

1 A. It's a trademark, yes.

2 Q. And why don't you highlight for us the main
3 difference that you see.

4 A. Sure. Well, another thing that is, if you will, a
5 challenge for the game industry today is this need for
6 immediacy. Consumers' attention spans are just less
7 than they were back in 1959, and they were pretty short
8 back then, too.

9 So what Hasbro has attempted to do here, as I
10 see it, is to, number one, include a cutout in the
11 cover that shows the most popular element of the game,
12 which is the spinner, and it also reminds people who've
13 played this game before that the feature they love the
14 best is still present; and secondly, this diamond
15 that's been placed in the corner on a yellow traffic
16 sign makes sure that consumers know there's no setup
17 really required and that play is easy.

18 These are two very important demands that
19 consumers nowadays place on deciding which games
20 they're going to play or not.

21 Q. In terms of the imagery, how would you describe
22 the focal point of the new game cover versus the
23 prototype?

24 A. Well, the prototype, clearly the focal point was
25 the title, which was a good idea in 1959. Here the

1 prototype is the experience, as you see from the
2 illustration --

3 Q. You said the prototype. You mean the --

4 A. Im sorry. The commercial version for 2015, the
5 cover communicates the experience.

6 In addition, you'll notice in the lower
7 left-hand corner there's in very, very bold type the
8 age appropriateness, which is now eight and up, versus
9 10 and up when the game was first created. This
10 basically suggests that the gameplay is now easier.
11 And there's also what's become a universal symbol in
12 modern game marketing of two players over a game table
13 and below it tells you how many players.

14 Q. So in terms of expression, as opposed to ideas or
15 concepts, do you see any overlap of expression between
16 the two covers?

17 A. No, there's no overlap of expression.

18 Q. Have you formed an opinion as to whether or not,
19 with regard to the new game's cover, it is the same as,
20 derivative of, or independent from the cover of the
21 prototype?

22 A. It's independent from the cover of the prototype.

23 Q. Why do you say that?

24 A. Because there's no commonality in its expression.

25 Q. Let's move on to the game boards, which is on

1 slide 12, and I may ask you a couple preliminary
2 questions about that as well.

3 Do you see evidence that Hasbro modernized the
4 game board as well?

5 A. Yes, I do.

6 Q. What elements do you see doing that?

7 A. First, all 3-D elements have been removed between
8 the prototype, the early commercial versions, and the
9 2015 version. The spinner is still present, although
10 its design is different and it no longer is a permanent
11 part of the board. As a matter of fact this spinner
12 and the compartments that are built into its molded
13 base are separate and it slides onto the corner of the
14 board before you start play.

15 Of great note is the track no longer
16 communicates gameplay instructions on every space. You
17 know, I remember that was one of the original criteria
18 that Mr. Klammer came up with is that the instructions
19 be on the space.

20 What Hasbro has done here is to greatly simplify
21 the look of the highway by removing game instructions
22 and instead when you land on specific spaces you draw
23 the card and you follow the instructions on the back of
24 the card.

25 Q. So do you see any similarity in expression between

1 these two boards?

2 A. I see similar concepts present, but I see no
3 similarity in expression.

4 Q. The concepts being what? What similar concepts do
5 you see?

6 A. I see a circuitous path, I see a spinner, and
7 that's basically it.

8 Q. And in your opinion as a game designer is the way
9 those concepts are -- I'm getting my singles and
10 plurals mixed up. Are the ways that those concepts are
11 expressed different between the two boards?

12 A. They are.

13 Q. Based on your experience, do you have an opinion
14 as to whether the new game's game board is the same as,
15 derivative of, or independent from the prototype?

16 A. It's independent of the prototype.

17 Q. What's your basis for that?

18 A. Again, because there's no expression in common
19 with what we see or assume to be seen in the prototype
20 given this black-and-white picture.

21 One more thing, too, is that the background of
22 the prototype was similar to the early commercial
23 versions in that it probably depicted the pastel color
24 scene in the countryside, but in the 2015 game Milton
25 Bradley has decided not to rely on that subtlety but

1 rather to have very clear illustrative graphics that
2 reinforce the theme of the game.

3 **Q.** And these aesthetic differences are, as you
4 testified, the result of Hasbro making judgments about
5 how to modernize the game?

6 **A.** I think it's everybody benefit associated with the
7 game, and Hasbro would have been included, to have kept
8 the game alive all these years through these updates.
9 In my experience, if they hadn't done this The Game of
10 Life would be a, a very notable game in the game hall
11 of fame and that would be about it.

12 **Q.** All right. Let's talk about the Despicable Me
13 version, which is slide 13 and 14, which is the cover
14 and the game board for JTX509 and HTX102. Do you
15 understand that Despicable Me is a series of movies
16 that have been out?

17 **A.** Yes, I do.

18 **Q.** And so that has its own intellectual property
19 associated with that franchise?

20 **A.** My grandkids love this franchise, so yes, I know
21 it has a very, very specific imagery and nature.

22 **Q.** So are you familiar with situations where a game
23 manufacturer obtains a license to utilize a third
24 party's intellectual property in connection with one of
25 its board games?

1 A. Yes. I believe that practice goes back at least a
2 hundred years.

3 Q. And you've been involved with that over your
4 53 years?

5 A. Especially during my Parker Brothers and Ideal Toy
6 days, that was half of our new product revenue.

7 Q. So what are game designers' goals when faced with
8 that kind of assignment?

9 A. First I should say the game designers like these
10 challenges because they are not a given. In the
11 industry, especially back in 1950s, there was a term
12 that evolved that was called label slapping, and label
13 slapping meant you took a game that already had an
14 identity and then you put a new character license on
15 the same game, like Superman, for example. But if you
16 recognized the game was just Parcheesi, so what. So
17 that was called label slapping. And that didn't really
18 help sales appeal especially over the long-term.

19 But in modern times game manufacturers have
20 gotten smarter and they realize that what consumers
21 would like is to have the essence of a well-established
22 game but with more theme appropriateness in the actual
23 final design. In other words it's a nice balance
24 between original concept and the theme.

25 Q. So as part of your analysis did you compare the

1 covers and boards of the prototype versus the
2 Despicable Me version?

3 A. I did.

4 Q. And what did you -- let's deal with the board
5 first. What did you find in terms of similarities?

6 A. I'm sorry, did you say the board first?

7 Q. I'm sorry, the cover first. What did you find in
8 terms of similarities?

9 A. No similarities except for the inclusion of the
10 trademark The Game of Life.

11 Q. And again, if you can highlight for the Court some
12 of the differences and the significance of those
13 differences.

14 A. You'll notice, again, they include in the
15 illustration the spinner that's found in this game
16 because of its long-standing appeal. They include a
17 lot of consumer helpful information. For example, the
18 age rating, the number of players. That warning, by
19 the way, is for small parts. They need to let you know
20 that there are parts in this game that could be
21 ingested by a three-year-old or less. In the bottom
22 right is the Hasbro games logo. And in the bottom left
23 there's a logo that makes sure the consumer knows that
24 this game is made in the USA.

25 Q. And from an aesthetic perspective, again, what is

1 the focus of the Despicable Me cover versus the
2 prototype cover?

3 A. Here the focus is on the imagery of the
4 Despicable Me licensing, including this very iconic
5 character in the lower right-hand corner. And by so
6 composing this cover which also, you know, hints at a
7 path that might be a highway in it, it's already
8 communicating to the consumer that this is the heart
9 and soul of the gameplay of The Game of Life, but it's
10 Despicable Me appropriate.

11 Q. So do you see creative elements in the cover for
12 Despicable Me that do not exist in the prototype cover?

13 A. Yes. By the way, one of the features, once again,
14 there's a cutout in the cover on the right to reveal
15 three of the playing pieces that are inside of the
16 game. This is another very important means of
17 instantaneous message delivery to the consumer because
18 when you actually see the parts that you're going to be
19 buying it's much more impactful than if you just simply
20 see a photograph with illustrations of it.

21 So the designer of this package, and I'm sure
22 based on the request of the marketing department, added
23 this reinforcement to the combination of the theme and
24 the gameplay.

25 Q. And then just also back to my question. These

1 changes that you're seeing, would you characterize
2 them as creative contributions?

3 A. Certainly. There's nothing functional about this.

4 Q. And I should have asked you the same question --

5 A. Except the cutout itself.

6 Q. I should have asked you the same question with
7 regard to the new game board and cover. Do you have a
8 view as to whether the changes that you see and the
9 differences that you see in the cover and the game
10 board for the new game are the result of creative
11 contributions from Hasbro?

12 A. Yes.

13 Q. So then moving to the board for Despicable Me,
14 which is slide 14 --

15 A. Yes.

16 Q. -- do you see -- so you talked about this label
17 slapping, which was sounds like something you don't
18 want to do.

19 A. No. That was prevalent in a bygone era.

20 Q. Do you see an effort here in the way that the game
21 board is designed for the Despicable Me version, an
22 effort to integrate the Despicable Me third party
23 intellectual property?

24 A. Yes.

25 Q. And how do we see that?

1 A. All of the graphics on this game are based on the
2 Despicable Me property. There is a path present, but
3 it's very different from the prototypes. There is a
4 spinner present, but it's a different design than the
5 prototype. And it includes a novelty component, which
6 are these Minion movers, these five white plastic disks
7 that you actually put your Minion on and spin during
8 the course of the game to determine which direction
9 you're going to move next.

10 Q. Do you see other similarities between the two
11 boards other than what you just described?

12 A. I do not.

13 Q. And you started to describe the differences, but
14 let me ask more holistically what differences in
15 imagery and aesthetics do you see between the two
16 boards?

17 A. Well, in the big picture once again the prototype
18 work is a pastel background of a countryside. In the
19 Despicable Me board it's a very vivid illustration of
20 imagery that reinforces the Despicable Me license as
21 applied to The Game of Life. And once again, instead
22 of having a path that has gameplay instructions on
23 every space, what we see are symbols which are
24 connected to gameplay in this new version, which have
25 no relationship to the gameplay in the original

1 prototype.

2 Q. And do you have a view as to whether these
3 differences that you've described are the result of
4 creative input from the people that work at Hasbro?

5 A. I do.

6 Q. And what is your opinion?

7 A. Yes, it does.

8 Q. And why do you say that?

9 A. Because the amount of originality that had to go
10 into creating this game is a hundred percent. I'm not
11 talking about the inclusion of the spinner, but the
12 graphics itself and the gameplay is completely
13 different. So that's creative. That's not functional.

14 Q. All right. And do you have a view, an opinion on
15 whether the game board for the Despicable Me version is
16 the same as, derivative of, or independent from the
17 game board for the prototype?

18 A. Both the package and the game board for this game
19 are independent.

20 Q. Why do you say that?

21 A. Because they bear no commonality and expression in
22 any way, shape, or form to the prototype.

23 Q. Thank you. I now would like to have you take a
24 look at HTX113, which is our demonstrative set for game
25 rules. I can put them up on the easels, too. Actually

1 I think it would be useful.

2 MR. KRUMHOLZ: May I approach, your Honor.

3 THE COURT: Sure.

4 (Pause)

5 Q. It may be a little easier rather than having to
6 flip back and forth. What I'd like to do is go quickly
7 through the rules for these various versions, starting
8 with the prototype, versus the early commercial version
9 rules, but again just let me ask some preliminaries.

10 Are you familiar with a creation of rules for
11 board games?

12 A. Yes, very much so.

13 Q. What are the goals for creating rules for board
14 games?

15 A. There are two components to writing rules for, to
16 writing good rules to communicate how a game is played,
17 and I want to start off by saying in my long experience
18 there's actually two types of writers who are employed
19 in the rule writing process. The first is a
20 promotional copywriter whose mission is to sell, and
21 the second is technical copy writer whose mission is
22 explain.

23 So a promotional copywriter will typically write
24 the copy for the package, would do the copy for print
25 advertising, and would write what we call the flavor

1 copy, which is the introduction to the game, because
2 the flavor copy, you want to excite the user and make
3 them more likely to want to read the rather tedious
4 rules to then follow.

5 The purpose of the technical writer is to write
6 the rules themselves, and the importance of writing to
7 explain is to write completely, you have to cover every
8 situation; to write succinctly, if I can use one word
9 instead of five and I'm a technical writer I use one;
10 and thirdly, to order the rules so that they introduce
11 the concepts of the game in the order that the user
12 expects them to be expressed.

13 Q. So then looking at the first page of HTX113, do
14 you recognize that as the rules from the prototype?

15 A. Yes, I do.

16 Q. And what was your overall impression of looking at
17 those rules?

18 A. The moment I saw these rules I knew that a
19 promotional copywriter had written them, and, by the
20 way, I think a very good one. The flavor copy at the
21 start here is just about as good as you could hope to
22 expect from someone who was submitting a game from the
23 outside.

24 But once the rules begin, that's where it breaks
25 down.

1 Q. Breaks down in what way?

2 A. The organization is wrong. The rules do not cover
3 all the situations that can come up in gameplay. The
4 sequence is not in the order that the user would
5 normally expect them to be. And, in addition, there's
6 just omissions.

7 Q. So do you recognize the second page of HTX113 to
8 be the game rules from one of the early versions of The
9 Game of Life from 1960?

10 A. I do.

11 Q. And that's HTX14. Did you at our request do a
12 comparison of those two sets of rules?

13 A. I did.

14 Q. And going to the third page of what we also have
15 up on the screen, did you -- actually the third and
16 fourth page, did you help create those slides to
17 explain what you view as the similarities and
18 differences?

19 A. Yes. I went through and found the similarities
20 and the differences.

21 Q. So pages 3 and 4 have the lettering for the
22 prototype rules versus the early version rules. Let's
23 walk through that quickly, and if you can tell us what
24 similarities that you saw.

25 A. Okay. So --

1 Q. So we start at A, which is the introductory
2 language. Did you see similarities there?

3 A. Yes. There's a lot in common between the flavor
4 copy in both games.

5 Q. And B is a little confusing because there's two Bs
6 on page 3 but that's the carryover paragraph. So in
7 terms of these other letters let's deal with it
8 holistically to the extent that's possible. What were
9 you seeing in terms of similarities for these other
10 designations?

11 A. Yes. The letters B through I believe it is H are
12 rules in common between or content in common between
13 both versions.

14 Q. When you say content in common, what do you mean?

15 A. In other words, for example, if we looked at B,
16 we'll start with B which has the start of the game.
17 There's a comparable rule in the commercial version
18 that's called To Start. We'll get into differences
19 later.

20 Q. Let's actually deal with that right now so we can
21 have some context. So what is similar and different
22 about that example?

23 A. Well, the writer titles this heading To Start the
24 game, but then inadvertently immediately goes into,
25 under the same heading, how to play the game. So, you

1 know, a technical rule writer would know never to do
2 that but rather to break these two ideas into separate
3 headings.

4 So if you look at the Milton Bradley rules,
5 that's just what they do. As soon as the information
6 on how to set up the game and begin it has been
7 explained, the next section of the rules is Playing the
8 Game. At this point you've done the preliminary; now
9 you're ready to get into it. And this heading is
10 essential to kick off the actual rules themselves in
11 the game.

12 Q. So in talking about similarities, is it fair to
13 say a lot of the headings overlap?

14 A. Yes.

15 Q. But in terms of the actual expression of the rules
16 themselves, do they tend to overlap or be expressed
17 differently?

18 A. They're expressed differently because the
19 technical rule writer, his mission is to, as I
20 mentioned, explain clearly, concisely, and
21 comprehensively.

22 By the way I think for a prototype these rules
23 did their job. They were sufficient so that when the
24 game came into Milton Bradley the internal designers
25 could look at it and figure out how the game is played.

1 But there's a big difference between initiating
2 a design staff whose job it is to work on games and how
3 it likely plays versus the job of the final rules,
4 which is to communicate to a consumer who has never
5 seen it before, and make sure they know how to play it.

6 And one of the problems, of course, of rule
7 writing is you have to playtest over and over again to
8 discover all the situations that could come up as a
9 sequence of the rules. And what happens if you land on
10 a space and you have no money and you can't pay your
11 debt? You have to explain that. You can't just leave
12 it for the players to figure that out. And that comes
13 about because lots of people, in particular consumers,
14 are brought in even in this era to playtest and to
15 determine what's missing.

16 So what's missing in the prototype rules is
17 basically the benefit of all that experience.

18 Q. So let's talk about the differences. Did you
19 designate the differences on pages 5 and 6 of HTX113?

20 A. I did, yes, in blue.

21 MR. KRUMHOLZ: Your Honor, if I may put them up
22 on the board.

23 THE COURT: Yes.

24 (Pause)

25 Q. Let's start walking through those. We have

1 between the two rules for the early commercial version
2 and the prototype, you have A which is at the end of
3 the prototype rules and at the beginning of the early
4 version rules. Can you explain that difference.

5 A. This is fundamental. The first thing that a
6 consumer needs to know is how many players can play the
7 game before you even go into the flavor copy. In
8 modern times an age rating would be included. It
9 wasn't back then typically. But in the prototype rules
10 it's almost the last thing that's expressed.

11 Q. And so is that an important change, from your
12 perspective?

13 A. Sure, because that's one of the first questions in
14 the mind of the consumer when they sit down to read a
15 set of rules.

16 Q. So let's then look at B. You see B is concerning
17 the spinning wheel to determine the banker and the
18 order. Can you tell us what differences you see there.

19 A. I'm sorry, where are we at now?

20 Q. The letter B.

21 A. Right. Okay. Yup. This is not really drawn out
22 as a separate important topic in the prototype rules,
23 but because of its importance it is brought out in the
24 production rules.

25 Q. I just want to interrupt you for a second just to

1 make sure we're all oriented, but when we're looking at
2 B in the early commercial version it's referring to the
3 language to the right of the letter?

4 A. Yes -- well, language to the left, isn't it, or am
5 I mistaken? I'm sorry; I read that wrong. Thank you
6 for correcting me. I did put the letters on the left;
7 I'm sorry. I'm left-handed.

8 Borrowing From the Bank? That's what we're
9 referring to?

10 Q. Yes.

11 A. Well, Borrowing From the Bank is completely
12 explained in B, which it is not in production game.

13 Q. So that's an addition.

14 A. Yes, it is.

15 Q. Okay. And what about C?

16 A. C is Betting on the Wheel. Once again -- there's
17 actually an imbalance in gameplay in the way the
18 prototype rules are written. The banker, the player
19 serving as the banker has an undue advantage according
20 to the way the prototype rule is read.

21 THE COURT: Could I just interrupt. I may not
22 be in the right place, but you just said that borrowing
23 is not in the production game but it is in the
24 commercial version. But isn't it right next to B in
25 the production? Am I looking at the right thing?

1 MR. KRUMHOLZ: Your Honor, let me try to orient
2 the witness a little, but this is a little bit of a
3 challenging thing here.

4 THE COURT: All right.

5 Q. So with regard to the concept of the spinning
6 wheel to determine the banker and the order, --

7 A. Yes.

8 Q. -- that concept, do you see -- is it expressed the
9 same way or is it expressed differently?

10 A. It's expressed differently.

11 Q. And how is it expressed differently?

12 A. I'm sorry, I'm not sure if I'm on the same page as
13 you're on here. I don't mean to --

14 Q. Yes, you're right; I have my little challenge
15 here.

16 (Pause)

17 MR. KRUMHOLZ: I'm getting some consultation
18 here from my associate. So in the early commercial
19 version the B is referring to borrowing.

20 (Discussion off the record)

21 Q. So the manner in which the Borrowing From the Bank
22 is expressed, is it similar or is it different?

23 A. It's different.

24 Q. And is one an improvement over the other?

25 A. Yes, because I mean in particular this whole

1 concept with promissory notes is sort of inferred in
2 the prototype and it's clearly spelled out. This is a
3 pretty sophisticated term even for a 10-year-old back
4 in 1959, the idea that you would have a physical
5 component in the game called promissory note. It's not
6 really included in a prominent fashion in the prototype
7 rule I think because the designers kind of just assumed
8 it. But, you know, Milton Bradley couldn't take that
9 chance. They had to be very specific in defining how
10 you record your borrowing, and that is you take a
11 promissory note of the amount of your loan.

12 Q. Okay. So instead of maybe focusing on the
13 letters, let's talk about some of the other differences
14 that you saw.

15 A. I think that's better.

16 Q. In terms of the Millionaire Acres language, --

17 A. Yup.

18 Q. -- could you explain any similarities or
19 differences there.

20 A. Well, as we spoke, the game has a path from start
21 to finish and finish is Millionaire Acres. When you
22 reach Millionaire Acres, you're done traveling. It's a
23 very significant change in the play of the game when
24 you reach this point and it's deserving of attention
25 and specific rules that explain all the possibilities

1 of what happens once you get there. That's not clear
2 in the prototype rules.

3 Q. So in your view is the expression different?

4 A. It's different and it's much better.

5 Q. How about Day of Reckoning?

6 A. We are at H now. Day of Reckoning has a very big
7 problem in the prototype rules, again, because of a
8 situations that have not been explained. What the
9 Bradley writer did is to make sure that all of the
10 possible situations have been numerically stated here
11 and that the impact of Day of Reckoning is made to seem
12 as important as it really is.

13 Q. And the other -- well, sorry. Go ahead.

14 A. I think that most significantly in these rules is
15 what is present in the production game but is absent in
16 the prototype. And that would be, in particular, the
17 Share the Wealth cards, which was a component not
18 included in the prototype, Lucky Days, which was a
19 feature of gameplay that was added, and the importance
20 of Pay Day, which is in the prototype rules sort of.

21 These are, based on my experience I believe that
22 these were added to the game to help maintain balance
23 so that one player didn't run away with the game. One
24 of the criteria that goes into good game design is
25 making sure that every player thinks they have a chance

1 to win until the very end and that really, I think, has
2 benefitted The Game of Life from the beginning. You
3 can be behind and the odds may not be in your favor,
4 but you can still win. So Lucky Days is a great
5 addition for that reason.

6 Share the Wealth is directly related to that
7 need because the Share the Wealth cards, which were not
8 in the prototype, enable you to get money from players
9 that have more money than you, so that helps to balance
10 it off.

11 And the concept of Pay Day is very significant
12 in the game because whenever you go past the Pay Day
13 space you collect your salary, which has been
14 determined early in the game when you either go to
15 college or decide that you want a business career.
16 That salary remains fixed throughout the game and is
17 collected every time you pass through or land on Pay
18 Day. It's easily overlooked if you don't call this
19 out. In other words you may think intuitively, well, I
20 only collect my pay if I land. But that's not the
21 case. You actually collect if you land or pass over
22 Pay Day.

23 Q. Thank you. Now, in terms of so we see there are
24 images in the early commercial version rules but not in
25 the prototype rules. What's the significance of any of

1 that to you?

2 **A.** Well, the significance is great because especially
3 for young kids who have to comprehend a game with this
4 many rules it's very helpful if each concept in the
5 game is accompanied by an illustration that helps to
6 evoke just what the rule is about. It makes it more
7 fun and enjoyable and it provides some confidence that
8 the reader of the rules knows what to focus on.

9 So if I, for example, I'm reading the rules the
10 first time and I see a tow truck, you know, picking up
11 a broken-down car, okay, that gets the idea for me,
12 I'm not making forward progress, and then I know I'm
13 going to be focused on what happens when I am told to
14 go backwards. So those illustrations improve the speed
15 by which rules can be comprehended, and they just make
16 the experience less dreary than it otherwise is.

17 **Q.** How significant are these differences from your
18 perspective as a game designer?

19 **A.** They're very significant because if you can't get
20 through the game and understand the rules correctly you
21 either give up, or you make up your own rules, which
22 doesn't work because that leads to controversy with
23 players who know how to play, or you make assumptions
24 that later on cause problems in comprehension.

25 I mean I know when I first, for example, played

1 Monopoly I was taught you can't buy any property until
2 you go around the board once. Well, that's not in the
3 rules; it's just that the aunts and uncles who taught
4 me the game thought that was in the rules. And as a
5 chief judge I have to correct that very often, by the
6 way. But no, I don't mean to be diverting here, but my
7 point is when people come together to play the game
8 they really need to understand and follow the rules so
9 that there's common enjoyment, that they all know what
10 they're doing and they're all on the same page.

11 Q. And do you feel that the differences and additions
12 are the result of creative input from whoever created
13 the rules?

14 A. Yeah. Clearly.

15 Q. So do you have an opinion as to whether the rules
16 for the early commercial version are the same as,
17 derivative of, or independent from the rules from the
18 prototype?

19 A. I believe they're derivative, yes, because there's
20 some similarities, but there is a lot of significant
21 new contributions to the rules; in particular, the
22 organization and the illustrations.

23 Q. Is it a close call for you, or no?

24 A. Between being independent and derivative? No, I
25 don't think it's a close call between being the same

1 as. It's derivative.

2 Q. Okay. How about being derivative and independent?

3 A. I don't think so because, as I say, the flavor
4 copy is well written and similar and some of the rule
5 copy carries over, so I couldn't say -- I know I
6 wouldn't opine that it's independent.

7 Q. If you could turn to page 7, that's the game rules
8 for the new game. Did you do a comparison for us for
9 that as well?

10 A. I did.

11 Q. And what did you observe in terms of similarities
12 and differences between the rules for the prototype
13 versus the new game?

14 A. There are concepts in common, but the expression's
15 completely different.

16 Q. How so?

17 A. Well, it's just by looking at it you can see that
18 there's all new illustrations. The layout is
19 different. They're much simpler. There is far fewer
20 contingencies that need to be explained in the new
21 rules. The components are actually and game spaces are
22 actually illustrated. In the prototype, of course,
23 there were no illustrations. And even the
24 illustrations that appear here, because they're
25 actually taken from the game itself, differ from the

1 early commercial versions.

2 Again, the cover page that we see on this rules
3 folder includes the trademark The Game of Life, which
4 is in common. But the rules aren't even called Rules
5 here; they're called Game Guide. And how to play, the
6 whole flavor copy, if you will, has been replaced with
7 this yellow rounded rectangle that just simply in one
8 sentence explains the game. This is very much, you
9 know, in keeping with the need in modern times to get
10 the idea of the game across quickly and to make the
11 comprehension of the rules much easier.

12 Q. And do you have a view as to whether these
13 differences that you've just described are the result
14 of creative input from Hasbro?

15 A. Yes, they are.

16 Q. They are. And do you have a view as to whether
17 the game rules for the new game are the same as,
18 derivative of, or independent from the rules from the
19 prototype?

20 A. Yes. These are independent.

21 Q. For the reasons that you've just described?

22 A. Yes.

23 Q. Lastly, go to slide 8, which is the rules from
24 Despicable Me, which is HTX102.

25 A. Yes.

1 Q. Did you do a comparison of those rules to the
2 prototype as well?

3 A. I did.

4 Q. What did you find in terms of the similarities and
5 differences?

6 A. Once again just the trademark, The Game of Life.
7 And also a picture of a spinner, just, you know, it's a
8 different spinner, as I said, than the one in the
9 prototype or the early commercial version, but it is a
10 spinner.

11 Q. But there is no spinner in the rules for the
12 prototype, or there is? Is there an image of a
13 spinner?

14 A. Well, the spinner is mentioned several times, but
15 it's not called out as such, how to use the spinner.
16 You just encounter it in the rules as you need it.

17 Q. So what differences, you know, obviously we can
18 see differences here, but what are the significant
19 differences from your perspective as a game designer?

20 A. Well, let's look at the cover of this folder.
21 After the The Game of Life we see the logo for the
22 license, Despicable Me. And then, instead of seeing
23 the flavor copy or the How to Play heading, we see The
24 Mission, so this is much more in keeping in what
25 happens in the Despicable Me license. But here, within

1 a few sentences you know exactly what you're going to
2 do.

3 And by the way, the references in this little
4 description about acquiring bunches of bananas and
5 becoming the favorite Minion, well, that's right from
6 the Despicable Me theme, and you'll notice that the
7 object is to collect bananas, not money, that's a huge
8 difference.

9 And then everything that flows thereafter has
10 different headings. The illustrations in this
11 particular document come directly from this version of
12 the game, and the copy generally is very succinct and
13 brief in each rule section. It's completely different.

14 Q. And do you have a view as to whether these
15 differences are the result of creative contribution?

16 A. Yes, they're creative contribution.

17 Q. Do you have an opinion as to whether the rules for
18 Despicable Me are the same as, derivative of, or
19 independent from the rules for the prototype?

20 A. They are independent.

21 Q. Based on all the reasons you've just provided?

22 A. Yes.

23 MR. KRUMHOLZ: Thank you.

24 I have nothing further, your Honor.

25 THE COURT: All right. Thank you, Mr. Krumholz.

1 All right. Cross-examination.

2 MR. POLLARO: Thank you, your Honor.

3 CROSS-EXAMINATION BY MR. POLLARO:

4 Q. Good morning, Mr. Orbanes.

5 A. Good morning, Mr. Pollaro.

6 MR. POLLARO: May I approach, your Honor.

7 THE COURT: Sure.

8 MR. POLLARO: More documents. Two for your
9 Honor.

10 THE COURT: Thank you.

11 Q. Mr. Orbanes, how old were you in 1959?

12 A. I was 12 years old in 1959.

13 Q. And that would make you 13 in 1960.

14 A. Yes, it would.

15 Q. And --

16 A. That's when I first played the game.

17 Q. First played The Game of Life?

18 A. Yes.

19 Q. You were not in the game industry in 1959 or '60;
20 correct?

21 A. No, I was not.

22 Q. You talked yesterday about mentors.

23 A. Yes.

24 Q. Is it fair to say that any knowledge that you may
25 have related to the game industry as it existed in 1959

1 or '60 was derived from others?

2 A. Yes, with one exception. The game industry didn't
3 change for about 20 years. What was going on in 1959,
4 as was explained to me, was the same, pardon me,
5 really continued through the 1970s. As a matter of
6 fact, when I got to Ideal Toy the management of that
7 company had been around since World War II. They
8 prided themselves in not changing since the 50s. So I
9 don't believe it was different in 1959.

10 Q. And that was explained to you by other people. It
11 wasn't your firsthand knowledge; correct?

12 A. No, it was not.

13 Q. As of 1959 or 1960 you had never stepped foot in
14 the manufacturing facility of Milton Bradley; correct?

15 A. No, I had not.

16 THE COURT: Mr. Pollaro, could you make sure you
17 use one of those microphones. You're kind of in the
18 middle. All right.

19 Q. In your experience, Mr. Orbanes, are there always
20 changes made to a prototype before it is
21 commercialized?

22 A. Yes.

23 Q. You testified yesterday that there were aesthetic
24 changes made to the prototype. Do you recall that
25 testimony?

1 A. I do.

2 Q. You based your testimony on your experience in the
3 game industry; right?

4 A. That's correct.

5 Q. Your experience was not with Milton Bradley but
6 based on the game industry in general; correct?

7 A. That's correct.

8 Q. Do you recall explaining why each of those changes
9 were made?

10 A. Yes, I do.

11 Q. Can you tell me if there were any changes that
12 were made that you simply cannot explain?

13 A. If I saw the specific change that you're referring
14 to I might be able to say if I couldn't explain it, but
15 in general I can explain the changes.

16 Q. Okay. Well, it sounded like yesterday you had an
17 explanation for every change. Do you recall any
18 changes that just befuddled you or just didn't make any
19 sense to you?

20 A. No, I don't.

21 Q. And your determination that the 1960 Game of Life
22 board is a derivative work is based solely on the
23 changes that you identified and discussed yesterday;
24 correct?

25 A. Yes.

1 Q. Yesterday you told the Court that it is your
2 opinion that the 1960 version of The Game of Life is a
3 derivative work.

4 A. Yes.

5 Q. Is it your understanding that a derivative work is
6 a work that is based on another work?

7 A. Yes.

8 Q. So is the 1960s version, a derivative work, is
9 based on another work; correct?

10 A. Yes.

11 Q. And can you tell me what that work is?

12 A. The prototype.

13 Q. The prototype. And if there was -- if it's for a
14 derivative work, any of those changes must be creative;
15 correct?

16 A. Correct.

17 Q. So in other words if we knew in the reverse if
18 there's any changes that were made to the prototype in
19 the commercial version that were not creative, it would
20 be the same work; correct?

21 A. I'm sorry. I'm not following your question, sir.

22 Q. You just told me that for a derivative work to
23 exist there needs to be creative contributions; is
24 that --

25 A. Correct.

1 Q. -- correct? Okay. I guess I'm doing it in the
2 reverse. If there are contributions that are not
3 creative, it's the same work; in other words, it's not
4 a derivative work. Correct?

5 A. You mean functional changes?

6 Q. Changes that are not creative. You talked about
7 creative changes yesterday; right? You understand
8 that?

9 A. The derivative work, as far as I know, includes
10 changes in modifications. I'm not sure if I follow
11 your question.

12 Q. So my question is yesterday you talked about the
13 changes that you believe to be in the commercial
14 version that were not in the prototype; correct?

15 A. Right, which would make it derivative.

16 Q. Just changes in general or changes -- do changes
17 have to be creative? That's what I'm trying to figure
18 out. Is it your opinion that changes must be creative
19 to transform an original work into a derivative work?

20 A. I think it has to be a modification, an addition,
21 or a deletion.

22 Q. Any modification, deletion or --

23 A. Yeah. I believe that's where you're going with
24 this.

25 Q. Let's not worry about where I'm going with --

1 THE COURT: Don't worry about where he's going.
2 Just answer whatever the question is that he asks,
3 okay?

4 THE WITNESS: Of course, yes.

5 A. Yeah, I believe that a change is a derivative.

6 Q. Any change?

7 A. Unless it's functional, which is not subject to
8 copyright.

9 Q. Unless it's functional.

10 A. Right.

11 Q. I think I'm understanding you. So let me ask you
12 this way. Does a change need to be creative in order
13 to transform a work into a derivative work?

14 A. If it's a different expression.

15 Q. If it's a different expression. Can you tell me
16 what you mean by that.

17 A. Change the wording, change the graphic, change the
18 three-dimensional design, change the position of
19 something that's in context with other things, yeah.

20 Q. So I want to make sure I'm understanding what
21 you're saying. So are your opinions based on your
22 understanding that any changes made to a work can
23 transform it into a derivative work regardless of
24 whether or not those changes are creative?

25 A. The answer is it can, yes.

1 Q. It can. So again I just want to make sure that
2 I'm crystal clear on what your testimony is and the
3 basis for your opinions. So is the basis for your
4 opinions that changes that are not creative can
5 transform an original work into a derivative work?

6 A. I think I'd have to see the specific changes, but
7 in general it can.

8 Q. In general it can.

9 A. In general it can, yes.

10 Q. Yesterday Mr. Krumholz used the word or the
11 phrase, I guess, that creative contributions cannot be
12 mere ideas, they must be physical expressions.
13 Correct?

14 A. That's right.

15 Q. And you identified a number of physical
16 expressions that you believed were different from the
17 prototype to the commercial version of the game;
18 correct?

19 A. I did.

20 Q. One of the expressions that you identified was a
21 transmission tower; correct?

22 A. Correct.

23 Q. Is it your opinion that the removal of a
24 transmission tower amounts to creative contribution?

25 A. No. This is a good specific. I would say no,

1 that's not creative.

2 **Q.** So it's not creative, so therefore if the only
3 change between the prototype and the commercial version
4 of the game was the removal of the transmission tower,
5 we have a derivative work or do not have a derivative
6 work?

7 **A.** If it was just the removal of a transmission
8 tower, I don't think that would be sufficient to call
9 it derivative.

10 **Q.** Okay. Fair enough. So now if we have the removal
11 of the transmission tower and the removal or the
12 lowering of the mountains, the height of the mountains,
13 if those are the only two changes, do we have a
14 derivative work?

15 **A.** Now it's derivative because the height of the
16 mountains has an aesthetic quality to it and it also
17 has an association in the minds of the consumer, so
18 this would be derivative.

19 **Q.** So let's back that out then. So if the only
20 changes -- let's forget about the transmission tower
21 for a second. If the only change between the prototype
22 and the commercial version of the game is the height of
23 the mountains, is it your opinion that that work would
24 be a derivative work?

25 **A.** Yes.

1 Q. You were talking just recently about versions of
2 the game, so I want to understand what you mean. I
3 believe you used the term modernized or updated. Do
4 you recall that?

5 A. I do.

6 Q. So in the lifetime of a game, have you experienced
7 multiple versions of the game?

8 A. I have.

9 Q. And when you talk about updating a game, can you
10 tell me a little bit more about what you mean.

11 A. Sure. It means basically doing a facelift, we
12 call it. That might mean a package whose graphics were
13 more acceptable to the current consumer. It could mean
14 adding or changing the graphics on the game board for
15 the same reason. It could also mean changing the copy
16 so that the copy is more appropriate to what the theme
17 of the game is in the eyes of the current consumer, --

18 Q. And --

19 A. -- among others, yes.

20 Q. And in your experience is that a sequential
21 process? For example, if a game exists for an extended
22 period of time and there are multiple versions, are
23 each version necessary predicated on the version
24 preceding it?

25 A. Certainly. You have a lineage, you do.

1 Q. A lineage. And so if I'm understanding your
2 testimony correctly, there would always be an original
3 version; correct?

4 A. Correct.

5 Q. And then after the original version there would be
6 subsequent changes that have facelifts or
7 modernizations?

8 A. Yeah. I would say even if the game stays the same
9 it's been my experience that over time the packaging is
10 going to be updated to reflect more modern art taste
11 and requirements, yes. But at times the game itself
12 has to be changed to stay current.

13 Q. And again, that's kind of a, I don't want to say
14 -- it's a sequential process; right?

15 A. Typically, yes. It's progressive.

16 Q. It's progressive. That's a good word. And so it
17 builds up on the prior version; correct?

18 A. Yes.

19 Q. So now if we talk about the concept that we were
20 just talking about before, which is we were talking
21 about changes and talking about what changes transform
22 an original work into a derivative work, do you recall
23 that?

24 A. I do.

25 Q. And it was your testimony that any change could

1 transform an original work to a derivative work; is
2 that correct?

3 A. That's what I said.

4 Q. So that means you would have to look at the
5 particular changes in question; correct?

6 A. Sure.

7 Q. Okay.

8 A. It has to be visible.

9 Q. It has to be visible.

10 A. Yes.

11 Q. And so going back to the transmission tower, is
12 that why you didn't believe that would be a derivative
13 work because the removal of the transmission tower is
14 not visible?

15 A. It was visible, but it had such an insignificant
16 contribution to the game that its significance would
17 not register whether it was there or not; unlike
18 mountains, which are very visible and whose height has
19 a contribution to the perception of the theme.

20 Q. Okay. Can you give me a --

21 A. By the way, the transmission towers, if you look
22 at them very carefully, they could be oil derricks.

23 Q. Fair enough. Can you give me a little more
24 clarity about where that line is drawn between the oil
25 derricks or the transmission towers and the mountains?

1 A. I think it's -- it has to be a matter of judgment.
2 You have to basically see the two to compare.

3 Q. Now, throughout the course of your testimony and
4 in your expert report you reviewed I want to say five
5 versions of the 1960 Game of Life; is that correct?

6 A. I reviewed five versions, yes.

7 Q. Okay. And I believe they're sitting over there on
8 the table.

9 A. Yes. I will accept that they are, yes.

10 Q. And they all bear the 1960 copyright date;
11 correct?

12 A. To the best of my knowledge they do, yes.

13 Q. Do you have an opinion as whether or not each
14 version that bears a 1960 copyright date was published
15 or was manufactured in 1960?

16 A. I couldn't know that for a fact, no.

17 Q. Okay. Why --

18 A. I would think because if the game bore the 1960
19 copyright it was considered to be adequately protected
20 by the 1960 copyright, even if it was published in a
21 subsequent year.

22 Q. Fair enough. And so is it your understanding that
23 until the game was published in a form that would not
24 be subject to the copyright date, it could be published
25 or manufactured in any year? Even today, it could be

1 manufactured in 2018, but if it hadn't changed it would
2 still bear a 1960 copyright date; correct?

3 A. It could bear a 1960 copyright date if the
4 changes, if any changes that had occurred were not
5 considered to be significant enough, as you just
6 pointed out.

7 Q. Exactly. So to the extent there are any
8 differences between any version of the five 1960
9 versions of the game, they are not significant for
10 copyright purposes; correct?

11 A. Well, I don't think so. I'm not suggesting that I
12 know specifically all the nuances of the copyright law
13 as applies to your question, but in my experience I
14 would say that I have not seen game manufacturers rush
15 to recopyright a game unless it was significantly
16 different.

17 Q. Copyrightedly different; correct?

18 A. Yes. A new game cover, for example, would require
19 a new copyright and that would go through. I'm not
20 sure if manufacturers typically do that if there was
21 minor changes in the rules, for example, or maybe small
22 inclusion or deletion on the game board. In practice,
23 is what I'm really referring to here through my
24 experience.

25 Q. I want to look at a couple of those games, if we

1 can. I'd like to look at HTX14 and HTX18.

2 MR. POLLARO: May I approach, your Honor.

3 THE COURT: Yes.

4 (Pause)

5 Q. I'm going to hand you what is HTX14. It is a 1960
6 version of the The Game of Life.

7 MR. KRUMHOLZ: Your Honor, is it okay if I come
8 around to get a better view.

9 THE COURT: Yes.

10 Q. Please take a moment to look at this. In
11 particular I want you to focus on the stop here
12 square --

13 A. Uh'huh.

14 Q. -- and the blue square above the spinner that says
15 Stop.

16 A. Right. Just that blue square?

17 Q. Yes, the blue square and the stop here for now.

18 A. Okay.

19 Q. Have you reviewed that game board before?

20 A. I have, yes.

21 Q. And now what I'd like to do --

22 MR. POLLARO: May I approach, your Honor.

23 THE COURT: Yes.

24 Q. -- is have you looked at what's marked HTX18,
25 which is also a 1960 version of the game, --

1 A. Yes.

2 Q. -- and I want you to compare those two portions
3 that we were talking about before --

4 A. Sure.

5 Q. -- and tell me what you see.

6 A. Can I turn this board around a little bit.

7 Q. Sure.

8 A. Just looking at these portions, there is
9 differences here. The original game, the starts here
10 start space is a circle that in white copy says Start
11 Here with \$2,000 and car.

12 In the version that I'm holding in my hand the
13 circle is now divided into a top and a bottom. The top
14 says Start Here with \$2,000 and car. The bottom says,
15 If you want auto insurance pay \$500, and the word
16 Option appears below that.

17 Q. Okay.

18 A. In addition, the blue space on the path that
19 Mr. Pollaro pointed out to me -- I'm not sure again;
20 could you show me which blue space you were referring
21 to? I want to make sure that I compare the right ones.

22 Q. The blue stop sign here, the Stop right before the
23 Pay Day, and that one.

24 A. This one, okay. Yes.

25 Q. And isn't it true that the version HTX18, the

1 space that you're looking at no longer says Stop?

2 A. That's correct.

3 Q. And isn't it also true that the space that we're
4 talking about on HTX18 also says the word Option next
5 to it?

6 A. Flanking it, yes, it does.

7 Q. Okay. So that's different. And my question to
8 you is in your opinion, based on your testimony thus
9 far, are these changes creative in nature?

10 A. These changes are beneficial to enhance the
11 definitiveness of what you do on these spaces, so these
12 are creative changes that are probably an improvement.
13 I'm sure this was done for that reason.

14 Q. And would you also call these changes aesthetic
15 changes?

16 A. Well, the addition of the wording and the
17 separation of the Start Here in the two colors is
18 aesthetics clearly.

19 Q. Is it safe to assume that one version of the game
20 came before the other version of the game?

21 A. I believe that, yes.

22 Q. And whichever version came first, is it your
23 opinion that the second version would have been built
24 upon the first version, at least directly or either
25 indirectly?

1 A. It appears that way, yes.

2 Q. Sitting here today do you have any idea whether --
3 let me back up.

4 So you -- we agree, or you have testified, that
5 one of these versions came first; correct?

6 A. Correct.

7 Q. And the other version came second.

8 A. Correct.

9 Q. Whichever one that might be; correct?

10 A. Yes.

11 Q. Okay. Do you have any idea if there would be any
12 intervening versions of the game?

13 A. Well, based on the two that you showed me, I
14 couldn't tell you that. I'd have to see the
15 intervening version.

16 Q. You can't say for certain; right?

17 A. No. But it seems logical, based on the small
18 changes that you have identified.

19 MR. POLLARO: I'm going to have to put these
20 things together.

21 Thank you.

22 MR. KRUMHOLZ: I don't think I'm the person for
23 that job.

24 Q. I want to make sure I understand your testimony.
25 So sitting here today, you have no idea if there's one

1 version, two versions, 10 versions, or no versions
2 between the two versions; correct?

3 A. No; I can say that there is a change between the
4 two versions.

5 Q. A creative change?

6 A. A creative change, yes.

7 Q. And also an aesthetic change for an improvement;
8 correct?

9 A. Yes. Correct.

10 Q. And if I understood your testimony before, you
11 acknowledged that they all bear the 1960 copyright
12 date; correct?

13 A. They do.

14 Q. Okay. So let's back up a little bit. You do
15 understand that work to be based on another --
16 derivative work has to be based on other work; correct?
17 We talked about that.

18 A. Yes, we did.

19 Q. So whenever there's a derivative work there's an
20 underlying original work; is that correct?

21 A. Correct.

22 Q. If you created derivative work, if you have a
23 derivative work, do you have any rights to the original
24 work?

25 A. You do not.

1 Q. You only have rights to the --

2 A. The changes.

3 Q. -- the changes. Okay.

4 A. Yes.

5 Q. So would you consider the two versions, HTX14 and
6 HTX18, to be derivatives of one another?

7 A. The changes that are in the latter are derivative
8 of the one that didn't have the changes.

9 Q. Okay.

10 A. The base game, if you want to call it that.

11 Q. Whichever one it was.

12 A. Yes.

13 Q. Sitting here today do you have an opinion which
14 one that might have been? Which one did you believe,
15 in your industry experience, would have been the
16 improved version and therefore the later version?

17 A. In my review of the five games, I believe that the
18 one that you showed me first to be the original.

19 Q. The one with the stop sign and without the option
20 on the --

21 A. That's correct. Other one appears to be the
22 benefit of publication of the prior one.

23 Q. Have you -- do you have any idea who at Milton
24 Bradley is making those changes?

25 A. Well, I can tell you from hard-earned experience

1 that when you publish a game, especially one where you
2 have a compressed period of time between the completion
3 of the design and the need to have that game available
4 at Toy Fair, that you have lots of people who are
5 interested in contributing to telling you what's wrong
6 with it.

7 You have the retailers, you have consumers who
8 -- by the way, having been in charge of consumer
9 relations at Parker Brothers, I can tell you the worse
10 thing you want is a rule defect because then you get
11 hundreds of letters, every one of which, if you want
12 your consumers or customers happy you have to write
13 back; and so the consumer research department is
14 probably the first line of defense to the company when
15 it comes to recognizing why enhancements or changes
16 need to be made.

17 In addition, the designers themselves, having
18 had a chance to catch their breath and look at what
19 they've done may very well say, you know, we should
20 have done this.

21 And, in addition, it's my practice or my
22 experience in practice that the inventor, as soon as he
23 gets his hands on it, if he's an interested party,
24 he'll come back and say, you know, I have a suggestion;
25 I think you should have done this.

1 So the number of people who come to bear to
2 bring about an improvement like this is pretty
3 substantial.

4 **Q.** I think I understood your answer. But I think I
5 heard you say the inventor, if he's interested, would
6 be one person likely to provide suggestions; is that
7 correct?

8 **A.** Yes. An inventor is one of the several parties
9 that would be contributing, and you would encourage
10 that.

11 **Q.** And you would expect that in your experience in
12 the industry that if an inventor was interested in the
13 game that they would provide suggestions to the
14 manufacturer; correct?

15 **A.** Sometimes the letter that comes from the inventor
16 is why did you ruin my game? Why did you do this? And
17 then we have to justify. Other times the inventor
18 says, you know, I really appreciate what you did, I've
19 got some thoughts; here's my suggestions.

20 **Q.** And the manufacturer in this case, Milton Bradley,
21 may or may not incorporate those suggestions; is that
22 correct?

23 **A.** Well, I think what a good manufacturer will do is
24 to collect all of the input, especially from the
25 consumer and the trade because they're so dependent on

1 the trades, you know, carrying the game, that they will
2 then say, okay, what are the most important ones and
3 which ones don't really count. And a good manufacturer
4 will make a revision, in particular, if there's time to
5 do it before the fall selling season -- because the
6 majority of games, especially in that era that were
7 sold at retail came in the last four months of the
8 year -- so if there's a chance that you can improve a
9 game prior to that season, it behooves the manufacturer
10 to do that, again, just to cut down on the number of
11 complaints that would come in from consumers with
12 questions and to make the trade happy.

13 Q. And I appreciate that. Now, back to the changes
14 that we were talking about, in particular the space
15 with the option, --

16 A. Yes.

17 Q. -- just because I remember that one more clearly.
18 Is it correct that your testimony was that that was an
19 improvement?

20 A. That was an improvement, I believe.

21 Q. Did you like that change?

22 A. I liked it. I did.

23 Q. And it helped -- what would be the right phrase --
24 the game play better?

25 A. Yeah. Something different happens on that space

1 and it's pretty good that you actually call it out.

2 Q. And so is it your testimony that -- let me strike
3 that and start over.

4 Have you reviewed any evidence in this case to
5 suggest where any changes were made to the game board
6 at any time?

7 A. Yes. I think I saw a letter from Mr. Markham to
8 that effect.

9 Q. Okay. Have you reviewed any evidence from anybody
10 else that made any suggestions to modifications of the
11 game board or the rules?

12 A. No. I believe that's the only document that I've
13 seen that addresses that.

14 Q. Have you seen any evidence, like the letter that
15 you're referring to from Mr. Markham, from Milton
16 Bradley discussing any modifications or changes?

17 A. Yeah, I remember seeing a letter from Mel Taft
18 where he said, well, thanks very much for your
19 suggestion but the game has bigger problems; it's too
20 much dependent on luck and we really need to add more
21 skill in the game. I do recall that one.

22 Q. Fair enough. And in that letter do you recall any
23 specific modifications that were made or suggestions?

24 A. In the Mel Taft letter?

25 Q. Yes.

1 A. If I saw the letter I can tell you. I don't
2 remember the details right now.

3 Q. Okay. But I'm just trying to get your
4 understanding as you sit here right now.

5 A. Yup.

6 Q. Because it sounded like you identified maybe an
7 issue that Mel Taft may have had, but I want to talk
8 more specifically about actual changes or suggestions.
9 Is your testimony that your recollection of that letter
10 is that there were actual changes suggested in that
11 letter?

12 A. From Bill Markham or from Mel Taft?

13 Q. I'm talking about the Mel Taft letter now. Let me
14 back up and I'll try to make it a little easier.

15 A. Okay.

16 Q. We've used the term "expressions" before; correct?

17 A. Correct.

18 Q. And we've discussed or you've discussed with
19 Mr. Krumholz this idea of concepts; correct?

20 A. Right.

21 Q. And so I guess what I heard your testimony to be
22 was you heard Mel Taft identify concepts that may or
23 may not need to be addressed; correct?

24 A. Well, without the letter in front of me I believe
25 you're correct. But he was talking about the overall

1 nature of the game and what feedback he was getting
2 that suggested its deficiencies.

3 Q. And if we go to the next part of that equation, in
4 my mind anyway, that there were no specific
5 expressions, as you sit here today, do you recollect
6 any -- do you recall any specific expressions that were
7 identified in this letter?

8 A. In the Mel Taft letter I don't recall any.
9 Without the letter being in front of me I can't verify
10 that, but I don't recall any.

11 Q. And can you tell me who that letter was sent to?

12 A. I don't recall if it was sent in response to
13 Mr. Markham or if it was sent to Mr. Klamer.

14 Q. Can you tell me why Mel Taft would have been
15 sending a letter to Bill Markham?

16 A. Probably in response to his letter.

17 Q. You testified earlier relatively recently about
18 the rules. Do you remember that?

19 A. Yes.

20 Q. Are you aware of any evidence that Mr. Markham
21 provided revisions to the rules to Milton Bradley?

22 A. I'm sorry; I couldn't hear couple of the words you
23 said.

24 Q. Are you aware of any evidence that Mr. Markham
25 provided revisions of the rules to Milton Bradley?

1 A. I don't think so.

2 Q. You don't think so. Okay. And the analysis that
3 we heard from you a little while before didn't, because
4 you don't recall that, would have necessarily not
5 included any revisions from Bill Markham to the extent
6 there were any; correct?

7 A. Correct.

8 Q. So if we, you know, talk about -- actually it's
9 still on the easel to your right -- any differences
10 that might have been in the rules from the prototype to
11 the commercial version of the game, you're not aware of
12 any evidence that any of the changes in the rules from
13 the prototype to the commercial version of the game
14 came from Bill Markham, are you?

15 A. No, I'm not. But again, during the process of
16 development very often the development team will
17 continue to play the game if they have a second copy,
18 and they might find things that they missed in the
19 rules and it would be good business for them to suggest
20 it. So I'm not saying he did or he didn't, based on
21 what I reviewed, but it's possible, sure.

22 Q. Okay.

23 A. That would behoove him.

24 Q. It would behoove Bill Markham to suggest --

25 A. And Reuben Klammer, yes.

1 Q. But as you sit here today, I just want to be
2 clear, are you aware of any evidence of either one of
3 those individuals providing specific suggestions to the
4 Milton Bradley?

5 A. I don't believe I reviewed any, no.

6 Q. Okay. I want to back up and you touched on it
7 slightly there. I believe your testimony was when you
8 looked at the prototype rules, I'm talking about the
9 rules, it sounded like, as someone in the industry
10 based on your experience, you knew exactly what to do
11 to make them better. Is that correct?

12 A. I knew principles that are instinctive in me by
13 this point to make them better, yes.

14 Q. And you based that testimony on your experience in
15 the industry; correct?

16 A. Well, and also -- yes. And not just my own rule
17 writing, which has been extensive over the years, but
18 my admiration for how technical writers in particular
19 approach this requirement and how they do it.

20 Q. And your experience is not specific to Milton
21 Bradley; it's based on the industry in general?

22 A. Yes. Heavily influenced by Parker Brothers, which
23 was very comparable to Milton Bradley.

24 Q. Very comparable. And any reason that either one
25 of those wouldn't have been comparable to the industry

1 at large?

2 A. No. And as a matter of fact a lot of the same
3 people who worked at Milton Bradley came to Parker
4 Brothers in product development and vice versa, so
5 there was cross-fertilization.

6 Q. Is it a rather incestuous field? Would you say
7 that?

8 A. Well, it's a small industry. At least it was
9 until modern times.

10 Q. Until modern times.

11 A. Yeah.

12 Q. And people have different views of modern times.
13 What are you considering modern times?

14 A. I would say the modern era began in fits and
15 starts the early 1980s with the introduction of
16 electronics and, more importantly, work stations and
17 automated typesetting machines, but it really got going
18 with the Internet age when the competition from apps
19 and instant gratification games had a significant
20 impact on how manufacturers approached the design and
21 development of board games.

22 Q. Okay. You mentioned two concepts there,
23 typesetting and the Internet age. I know you mentioned
24 more, but those are two that --

25 A. Well, those are two bright points, because in the

1 beginning of the 1980s the game industry was seriously
2 impacted by the advent of video games, and the video
3 game industry just took a lot of money away for a while
4 from board games and manufacturers knew they had to
5 respond with something.

6 In addition, and this to me was a miracle,
7 suddenly you didn't need to do graphics with your
8 hands; you could do graphics on a monitor, a computer
9 monitor.

10 Q. And that made things easier?

11 A. Oh, it certainly did. But it didn't mean that it
12 happened all at once. You know, artists had to learn
13 how to use these things. I remember the first
14 investment that Parker Brothers made in a word
15 processing system, my God was it expensive, tens of
16 thousands of dollars, so it was not something that a
17 company did just because the technology was available.
18 It took time before the cost became favorable and more
19 people accepted the notion that graphics and
20 typesetting should be done on computers.

21 Q. Fair enough. And once that occurred then things
22 became easier; right?

23 A. They did.

24 Q. And it continues. I mean maybe it's an
25 overgeneralization, and you can tell me if you

1 disagree, but people can do that almost nowadays on
2 their own computers; right?

3 A. Yes. Well, clearly they can.

4 Q. And that makes things easier; correct?

5 A. Yes.

6 Q. And faster.

7 A. Still requires talent. But you can do it, and I
8 can do it, and so can a graphic artist.

9 Q. I appreciate that. I'm not sure I could it, but I
10 appreciate your confidence.

11 So I do want to go back to the rules. You
12 talked specifically about moving the, I believe it was
13 the number of players from the bottom to the top; is
14 that correct.

15 A. Yes.

16 Q. And I believe you described that change as a
17 fundamental change; is that correct?

18 A. I did, yes.

19 Q. Can you tell me why that is?

20 A. Because the, one of the first questions that needs
21 to be answered for a consumer is how many players can
22 play this game. You don't want to find that out at the
23 end of the rules.

24 Q. And you're basing that testimony based on your
25 experience in the game industry; correct?

1 A. Yes.

2 Q. Not specific to Milton Bradley; just the game.

3 A. Correct.

4 Q. And so when you saw those rules, if you would have
5 seen the prototype rules, and you did see the prototype
6 rules, you would have immediately said I can fix that;
7 correct?

8 A. Yeah. Sure.

9 Q. Okay. And basically someone --

10 A. That's fair.

11 Q. I'm sorry for cutting you off. So someone in the
12 industry would know let's take that off the bottom and
13 put that on the top?

14 A. Correct.

15 Q. And it's fundamental, I believe; right?

16 A. Yes.

17 Q. Are you aware that Milton Bradley entered into a
18 license to manufacture The Game of Life; correct?

19 A. Correct.

20 Q. You've reviewed that license?

21 A. I have.

22 Q. Now, I guess I want to make sure I understand your
23 testimony. So your testimony is -- and the earlier
24 commercial version of the game, the rules are sitting
25 on the easel to your right.

1 Your testimony is and your opinion is that those
2 rules sitting right there that accompany the games
3 behind me are independent works; is that correct?

4 A. No. I didn't say independent.

5 Q. You believe those are derivative works?

6 A. I said derivative, yes.

7 THE COURT: Mr. Pollaro, we need to take a
8 break. Let's go off the record for a moment.

9 (Discussion off the record)

10 (Recess)

11 THE COURT: Mr. Pollaro, you may proceed.

12 MR. POLLARO: Thank you, your Honor.

13 Q. A couple more quick questions, Mr. Orbanes, and
14 then we'll switch gears.

15 A. Okay.

16 Q. You are aware that Milton Bradley entered into a
17 license to manufacture The Game of Life; correct?

18 A. I am.

19 Q. And you have reviewed that license?

20 A. I have.

21 Q. Now, am I correct that your testimony yesterday
22 and today includes at least some portions that are, of
23 the game or the rule, whatever it might be, that you
24 believe are independent works; is that correct?

25 A. I don't think -- I'm sorry, I'm lost.

1 Q. It was a terrible question. Let me start again.

2 A. Yup.

3 Q. Let's use the Despicable Me, for example.

4 A. Yes.

5 Q. I believe it was your testimony earlier that you
6 believe that that was an independent work; correct?

7 A. Yes.

8 Q. And also, for example, let's use the current
9 version of The Game of Life, and I believe it was your
10 opinion that it was an independent work; correct?

11 A. Correct.

12 Q. On all three fronts: The board, the box, and the
13 rules; correct?

14 A. Correct.

15 Q. Okay. And so I want to make sure I have your
16 testimony correct. Is it your understanding and is it
17 your testimony Milton Bradley would not require a
18 license to produce those products that you believe are
19 an independent work?

20 MR. KRUMHOLZ: Objection, your Honor.

21 THE COURT: Grounds?

22 MR. KRUMHOLZ: He's asking his legal opinion as
23 to whether the enforcement of a license agreement on
24 what could be cover or trademark issues or other IP
25 issues. The problem with the question is it assumes

1 that copyright is the only basis for whatever the
2 rights may be under the license agreement.

3 THE COURT: Well, he can rephrase the question
4 to accommodate that portion which is objectionable and
5 direct him only to copyright issues. I think it's an
6 important issue. I'm interested in it myself. Whether
7 the witness can answer it or not we'll find out.

8 Why don't you try to rephrase your question. Do
9 you understand what he's getting it?

10 MR. POLLARO: I do, your Honor, thank you, and I
11 think that's appropriate.

12 Q. Mr. Orbanes, my question to you is -- let's try to
13 simplify it if I can. Let's talk about the current
14 version of The Game of Life; correct?

15 A. Yes.

16 Q. Okay. Now, the current version of The Game of
17 Life, as I understand your testimony, is, with respect
18 to the three copyrights in this case, an independent
19 work; correct?

20 A. Yes.

21 Q. So now let's assume that we care for the purposes
22 of this question only about the copyrights; correct?

23 A. Right.

24 Q. In other words we don't care about trademarks, we
25 don't care about trade address, trade secret, anything

1 else; okay? We're just talking about the copyrights.

2 Now, is it your testimony and your understanding
3 that based on your -- how many years experience?

4 A. Fifty-three.

5 Q. -- fifty-three years experience in the industry,
6 that Milton Bradley can sell the current version of The
7 Game of Life without a license?

8 A. You mean if the --

9 MR. KRUMHOLZ: Objection. I don't think that
10 solves the problem. I mean if we just isolated it to
11 copyright questions, I get that.

12 THE COURT: I understand your objection. I
13 think that in formulating your question you need to
14 separate from the license for now, okay, and just focus
15 on copyright and then maybe you can move to a question
16 about the license.

17 Q. I'll try again, Mr. Orbanes. Bear with me.
18 Again, focusing on the current Game of Life, correct,
19 it's your testimony that the current Game of Life is an
20 independent work with respect to the three copyrights
21 at issue in this case; correct?

22 A. Yes.

23 Q. Based on that testimony, is it your understanding
24 that the copyrights at issue in this case don't cover
25 the current version of the game?

1 A. Yes.

2 Q. And as a result of that -- you testified you
3 reviewed the license in this case?

4 A. I did, yes.

5 Q. Okay. And you understand that license as someone
6 in the industry?

7 A. Yes.

8 Q. And so now my question is just with respect to the
9 copyrights, is it your understanding that Milton
10 Bradley is free to sell the game irrespective of that
11 license?

12 MR. KRUMHOLZ: Same objection, your Honor.

13 THE COURT: I'm going to sustain the objection
14 as to the application of the license. Although this is
15 a valid question that you're raising, I intend to ask
16 that question of you and of Mr. Krumholz, but I don't
17 think it's an appropriate question for this witness.
18 You've covered what you need to cover with respect to
19 the copyright.

20 MR. POLLARO: Thank you, your Honor.

21 Q. Switching gears. Yesterday you made some opinions
22 based on certain assumptions Mr. Krumholz gave you. Do
23 you recall that?

24 A. I do.

25 Q. I'd like to give you some assumptions now and see

1 your opinions.

2 A. Okay.

3 Q. I believe Josh said that you would be willing to
4 do that.

5 A. I believe that I'm receptive. Okay.

6 Q. Let's assume the following facts.

7 A. All right.

8 Q. Reuben Klamer and Bill Markham had an ongoing
9 relationship whereby Markham created products and
10 Klamer sought to sell those products through his
11 company to various publishers. That's fact one.

12 A. Okay. I'm assuming that.

13 Q. You with me?

14 A. I'm with you.

15 Q. Bill Markham had been working on a
16 three-dimensional game with a spinner that could be
17 folded.

18 A. I understand that assumed fact, yes.

19 Q. Okay. We'll get to that. Fact three, Klamer,
20 through his industry contacts, learned of an
21 opportunity to license a game to Milton Bradley.

22 A. Okay. I assume that.

23 Q. You understand all three of those facts?

24 A. I do.

25 Q. Would that situation be unusual in your

1 experiences in the industry?

2 A. Based on my knowledge of the individuals involved,
3 or just in general?

4 Q. You can give me both.

5 A. I would like you just to sum up the three facts
6 for me so that I can give you the benefit of my wisdom
7 here.

8 Q. You'd like me to go through the facts again?

9 A. Just name the three facts. Thank you.

10 Q. Sure. No problem.

11 Fact number one, Klamer and Markham had an
12 ongoing relationship whereby Markham created products
13 and Klamer sought to sell those products through his
14 company to various publishers.

15 A. Okay. So Klamer in this case is acting as an
16 agent, is that what you're saying, on behalf of
17 inventions by Bill Markham?

18 Q. I'm asking you to assume those facts. If you
19 interpret those facts to be --

20 A. Well, it makes it easier for me to get a grip on
21 what you're assuming here. So I think that's what
22 you're saying.

23 Q. Is that, based on your experience, what you
24 understand, based on the assumed fact I gave you?

25 A. Well, if an inventor who doesn't have either the

1 interest in selling his own ideas or doesn't really
2 have industry contacts relies on an intermediary, that
3 intermediary is very often called an agent. The agent
4 in particular is of value to the inventor because he
5 does have the industry contacts and he is good at
6 selling. So if that's your assumption, then I'm with
7 you.

8 Q. Let's start from there. Fact number two, I'm
9 going to go over it again. Bill Markham had been
10 working on a three-dimensional game with a spinner that
11 could be folded.

12 A. I'll assume that. Okay.

13 Q. Okay. Fact three, Klamer, through his industry
14 contacts, learned of an opportunity to license a game
15 to Milton Bradley.

16 A. Okay. Got it.

17 Q. You with me?

18 A. I'm with you.

19 Q. Okay. Would that situation be unusual with your
20 experience in the industry?

21 A. Agent, inventor, opportunity, in the order you
22 presented, that happens, certainly.

23 Q. Is it common?

24 A. Not as common as -- in my experience, especially
25 during my Ideal and Parker Brothers days, it was

1 uncommon because typically agents, inventors, and
2 opportunity do not all line up at the same time. But
3 I'm with you, and it has happened, so let's just assume
4 that I'm with you. Okay?

5 Q. Okay. Maybe I'm not following you, because I just
6 want to make sure I understand your answer there.

7 So the first fact assumes there's an ongoing
8 relationship with Klamer and Markham; correct?

9 A. I got it.

10 Q. And so I think you used the term "agent." That's
11 how you interpret that fact?

12 A. It's a handle.

13 Q. It's a handle. Okay. So now --

14 A. Then Markham had this idea.

15 Q. That's where I was going.

16 A. Right. And then there was an opportunity that
17 Mr. Klamer was aware of?

18 Q. Uh'huh.

19 A. Okay. I got it.

20 Q. Now, you said it happens; correct?

21 A. It happens, sure.

22 Q. But I thought you then said it was unusual, and I
23 guess I want to explore that. Why is it unusual?

24 A. Because most of the contact that I had with idea
25 people was inventors coming to me with their ideas that

1 they had other people work on their behalf. They were
2 agents, but they were not necessarily significant.
3 There were some, yeah.

4 Q. Okay. Now -- but it happens, based on your
5 experience; correct?

6 A. It happens, sure.

7 Q. And I mean, again --

8 A. I mean three guys in Canada who were news -- I
9 mean sports writers came up out of the clear blue with
10 Trivial Pursuit. It happens. They were not even in
11 the industry.

12 Q. And this would have happened in 1959, 1960;
13 correct?

14 A. Yes.

15 Q. Would that situation be consistent with an
16 inventor and an agent working together to license a
17 game to a company?

18 A. As you described it, yes.

19 Q. Okay. So based on that hypothetical, you say it
20 happens and it would be consistent; correct?

21 A. It would be consistent.

22 Q. Now let's back up. Before I started asking you
23 the hypothetical you said am I basing that on your
24 knowledge of Reuben Klammer, the parties. Is that what
25 you said? Did I mishear you?

1 A. I'm not sure I follow you.

2 Q. I thought you were telling me that -- you asked
3 for a qualification on am I going to answer this
4 hypothetical based on the assumed facts or based on my
5 understanding of the parties involved.

6 A. I think what you're asking me is to assume this
7 alternate these set of facts and then to offer you my
8 opinion on it.

9 Q. Okay. And you used the word "alternate." Can you
10 explain that to me.

11 A. Well, the facts that I was asked to presume in
12 this case are in conflict with the facts that you've
13 just given me.

14 Q. So the facts that I gave you, you said, are not
15 the facts that you were asked to assume; correct?

16 A. That's correct.

17 Q. Okay.

18 A. I can certainly comment on this set of facts that
19 you're asking me about. I have enough experience to do
20 that.

21 Q. And again just so I'm clear, did you just comment
22 on that, or do you have other comments?

23 A. I'm waiting for you to ask me what's next.

24 Q. Well, okay. You said you have comments on these
25 assumed facts, so I want to know what those --

1 A. I didn't say I had comments on them. I said I can
2 comment on them when you're ready. I don't know where
3 you're going with this yet, but I will help you if I
4 can.

5 Q. Okay.

6 THE COURT: I'm getting very confused. Let's
7 try to keep this simple. You've asked him to assume a
8 certain set of facts. You asked him if that was usual
9 or unusual, and he said it was not common. You asked
10 him if it was consistent with an inventor and an agent
11 licensing a game, and he said it is. So let's get to
12 the next; whatever it is that you want to get to, let's
13 get to it.

14 MR. POLLARO: Thank you, your Honor.

15 Q. You indicated that these were alternate facts;
16 correct?

17 A. Yes.

18 Q. And my understanding of your testimony is that you
19 believe they are alternate facts because they were not
20 the facts that you were asked to assume; is that
21 correct?

22 A. That's correct.

23 Q. My question is what did you do to investigate
24 whether or not the assumed facts you were given were
25 accurate?

1 A. I don't think that was my job. I was asked to
2 assume these facts and then to offer my opinions.

3 Q. So is the answer nothing?

4 A. In the narrow context of my expert report, I only
5 relied on the facts that I was assumed to rely on, and
6 I compartmentalized anything else that I may know that
7 could have been brought to bear because that's not my
8 task.

9 Q. Okay. I want to explore that. So is the answer
10 no?

11 A. I'm sorry, the question again is?

12 Q. The question is did you do anything to determine
13 whether or not the assumed facts you were given were
14 accurate?

15 A. I accepted the assumed facts.

16 Q. And again, I just want to make sure I'm getting an
17 answer to my question. And so you did nothing to
18 determine whether or not those facts were indeed
19 accurate?

20 A. That wasn't my mission.

21 Q. So is the answer no, then?

22 A. I'll say no for the sake of what you're asking.

23 Q. Thank you.

24 A. Okay.

25 Q. Now, you also testified that you compartmentalized

1 information you may know. Is that fair?

2 A. Yes, that's fair.

3 Q. And so what do you mean by that?

4 A. Any knowledge that I may have had about the
5 participants or prior knowledge that I had about the
6 history I had to compartmentalize because I had to
7 focus on the assumed facts.

8 Q. When you say compartmentalize, you're saying you
9 had knowledge about the participants in my
10 hypothetical; correct?

11 A. Yes.

12 Q. And you did not utilize any information in
13 answering my question or in answering the assumed facts
14 that you were --

15 A. No. If you look at my report, I based all of my
16 opinions on the facts and the law that I was asked to.

17 Q. I'm going to switch gears.

18 A. Okay.

19 Q. The term -- I believe it was your opinion, pardon
20 me, I don't recall if it was yesterday or today, but I
21 believe that you opined that the terms in the
22 assignment agreement are reasonable. Is that correct?

23 A. Yes.

24 Q. And you believe that to be true?

25 A. I do believe that to be true.

1 Q. And all the terms of the assignment agreement;
2 correct?

3 A. Yes.

4 Q. And you reviewed that assignment agreement?

5 A. I did.

6 Q. Was it your testimony that the royalty in the
7 assignment agreement was reasonable for Bill Markham?

8 A. I think the royalty is, based on my experience,
9 generous.

10 Q. Can you tell us again why you believe it is
11 generous.

12 A. Because his share was not based on the product
13 component of the royalty, it was based on the entire
14 royalty, which included an extra percent for
15 Mr. Linkletter's contribution. Now I cannot comment on
16 what that was worth in 1959 or '60, but I can tell you
17 that in subsequent years that would have been worth up
18 to 10 percent, not 6 percent total. So it was a good
19 deal for Milton Bradley and it was a good deal for
20 Mr. Markham because he received 30 percent of the
21 total.

22 Q. And is that unusual in your experience, that
23 someone like Bill Markham would get that amount of
24 royalties?

25 A. Typically in my experience, as I mentioned

1 yesterday, a point-and-a-half based on 5 percent would
2 be standard or one point. So 1.5 percent of 5 is
3 30 percent of 5, not 30 percent of 6.

4 Q. Is that because -- I believe it was your opinion
5 that was because a design firm would typically not be
6 paid that much in royalties? Is that correct?

7 A. No. What I'm saying here in specific is the
8 design firm normally wouldn't share in the promotional
9 component of a royalty. The design firm that had
10 creative and time pressures on it would be entitled
11 fairly to 1.5 percent of 5, yes. I've done deals like
12 that, and the parties have very happy to get that.

13 Q. Is it typical in your experience -- let me start
14 again. What is your understanding with respect to Bill
15 Markham -- let me start again.

16 Have you used the term "design firm" to apply to
17 Bill Markham's company?

18 A. Yes. To the best of my knowledge his firm was an
19 advertising design agency at the time that Ruben Klammer
20 was employing him through the late 1950s.

21 Q. And just so I'm clear, and we're going to talk
22 about that in more detail, is that an assumed fact that
23 you were given?

24 A. Well, I know individuals who were there at that
25 time who knew that to be a fact.

1 Q. Can you tell us who those individuals are?

2 A. In particular a gentleman named Rene Soriano, who
3 is probably about 85 years old. Rene, after he came
4 out of the military, went to the same design schools
5 that both Grace and Leonard did, according to their
6 testimony. He worked initially at Allen & Shaw, which
7 was one of the design firms that Ruben Klammer had
8 indicated on the note that he wrote on the flight back
9 from New York. He knew the Markham agency as a result
10 because they were competitors. He also became a game
11 inventor, and Reuben Klammer worked with him on game
12 inventions.

13 Rene then worked for Eddy Goldfarb, which was
14 the second leading toy and game firm in the area, he
15 was located in southern California, and he knew Bill
16 Markham's advertising agency.

17 I got to know Rene because he then became a
18 designer at Ideal Toy and ultimately came to work at
19 Parker Brothers.

20 Q. I appreciate that. Is it typical in your
21 experience for a design firm to be credited on the
22 cover of a box as the game designer?

23 A. In that era it was not even uncommon, it never
24 happened. Which is a bone of contention, by the way, I
25 should just add, with a lot of inventors. Sid Sackson,

1 for example, who Mr. Carty mentioned yesterday, you
2 know, companies in that era promoted themselves, they
3 promoted their companies as a brand, and they were very
4 reluctant to recognize that anybody outside of the
5 company actually was responsible for the creative
6 content of their games.

7 The first time that I encountered this was
8 actually in the early 1970s, and then in fits and
9 starts it began to become more accepted in the 80s and
10 thereafter.

11 Q. Is it typical in your experience for a game
12 designer to be credited on the cover of the box?

13 A. Nowadays it's more common. It was not done at all
14 in 1959.

15 Q. And in your experience and your understanding,
16 that doesn't mean that was because game designers
17 didn't try; correct?

18 A. They tried. I'm sure they did.

19 Q. Would you expect that type of term to be in an
20 agreement?

21 A. Well, I don't think it would be in an agreement
22 between an inventor and a manufacturer because the
23 manufacturer back then just would have X'd it out; it's
24 a nonstarter. And I don't know if anything else counts
25 because if that agreement, let's say, was between

1 subservient parties it would be a kind but empty
2 gesture.

3 Q. Okay. And to the extent an agreement contained a
4 provision about identifying a game designer on the box,
5 would that be, in your experience, reasonable and
6 customary?

7 A. No. As I said, no manufacturer in that era had
8 that policy. They would have never put that clause
9 into a contract.

10 It began, by the way, in the 1970s when an
11 organization named the Marvin Glass Company, which was
12 by far the hugest game inventing and toy inventing firm
13 in the country, basically said we want our logo on your
14 package if you want to license this, and that was met
15 with -- you know, that was a tipping point in the
16 industry when they finally, when their wishes were
17 ceded to; so that came later.

18 Q. You've talked about -- you've referred to
19 contracts with the manufacturer. Are you familiar in
20 your experience with contracts between other parties in
21 the industry? For example, an inventor and an agent?

22 A. Sure. I was, you know, taught the ropes on this
23 by Alice Nichols and Felicia Parker when I was quite
24 young.

25 Q. Would a provision that identified an inventor as

1 the designer on the box be a reasonable term in a
2 contract between an inventor and an agent?

3 A. Well, I can tell you in specific that they
4 represent Sid Sackson, the inventor that we spoke of a
5 lot yesterday, and Sid really wanted to have credit for
6 his inventions on the packages of the games that they
7 were selling for him. I would imagine that they would
8 have said to him, either in verbiage or in writing,
9 we'll do our best.

10 Q. So if I understand your testimony, Sid Sackson
11 wanted his name on the box as a designer; correct?

12 A. Sure. Like many designers -- pardon me, not
13 designers -- like many inventors of the era they wanted
14 recognition, yes.

15 Q. And by virtue of his name being on the box, people
16 would identify him as the inventor; correct?

17 A. Certainly. It would be a great source of pride,
18 I'm sure, if the name appeared on the package.

19 Q. And the industry would know that Sid Sackson was
20 the inventor; correct?

21 A. That's what the purpose of it would be, yes.

22 Q. Let's look at -- do you have the binder that I
23 handed you earlier?

24 A. I do.

25 Q. I want to talk about your report. If you turn to,

1 it should be Tab 1. Do you see your expert report in
2 there?

3 A. I'm sorry what tab are we on?

4 MR. POLLARO: May I approach, your Honor.

5 THE COURT: Yes.

6 (Pause)

7 MR. POLLARO: We'll come back to that.

8 THE WITNESS: Okay.

9 (Pause)

10 MR. POLLARO: May I approach, your Honor.

11 THE COURT: Yes.

12 MR. POLLARO: I'm going to hand you a binder of
13 your reports.

14 Your Honor, two copies.

15 THE COURT: I think you gave me the reports
16 yesterday, so I think I have them.

17 MR. POLLARO: I can take them off your hands.

18 THE COURT: Yes, go ahead.

19 Q. I apologize, Mr. Orbanes.

20 A. That's okay.

21 Q. If you look at the first tab, you see your expert
22 report?

23 A. I have it here, yes.

24 Q. Do you identify that as your expert report?

25 A. I do.

1 Q. That's your signature on the bottom?

2 A. It is.

3 Q. Now, I do want to explore some of these concepts
4 we've been talking about. So at the time you first
5 formed your opinions in this case, it looks like on
6 December 18, 2017, you had reviewed the documents on
7 Appendix B of your opening report; is that correct?

8 A. Appendix B?

9 Q. Appendix B.

10 A. I see Appendix A twice. Am I missing something?
11 Would you like to look at this again?

12 MR. POLLARO: May I approach, your Honor.

13 THE COURT: Yes.

14 (Pause)

15 THE COURT: Maybe to -- we can go off the record
16 for a minute.

17 (Discussion off the record)

18 MR. POLLARO: Your Honor, we can come back to
19 that. I don't want to waste everybody's time. Are we
20 on the record?

21 THE COURT: Yes.

22 Q. You testified that the board, the box, and the
23 rules of the current Game of Life are independent
24 works; correct?

25 A. I did.

1 Q. And in forming that opinion you looked at the
2 current version of The Game of Life and compared it to
3 the prototype; correct?

4 A. I did, yes.

5 Q. I'd like to show you the current version of the
6 game.

7 MR. POLLARO: May I approach, your Honor.

8 THE COURT: Yes.

9 Q. I'm handing you what's identified as HTX019. Now,
10 have you seen that game before?

11 A. I have.

12 Q. And based on your testimony yesterday as I
13 understand it, in determining that the current Game of
14 Life which you're holding in your hand, HTX019, is an
15 independent work, you compared it against the
16 prototype; correct?

17 A. I did that this morning.

18 Q. This morning. I apologize. And that was a
19 comparison you did. That was the extent of the
20 comparison you did and you identified what you believed
21 to be differences; correct?

22 A. Yes.

23 Q. And just so we're clear, that opinion applied to
24 the rules, the board, and the box cover?

25 A. That's correct.

1 Q. So yesterday we talked about some of the
2 differences between the prototype box cover and the
3 early version of the game. Do you recall that?

4 A. I do.

5 Q. And you had certain colors, circles. You remember
6 that?

7 A. I do.

8 Q. One of the circles that you had and you discussed
9 was the product code. Do you remember that?

10 A. You mean the product number?

11 Q. Yes.

12 A. I do, yes.

13 Q. And so do you see the product number on the
14 current version of the game, HTX019?

15 A. Let's see here. We did see it on the front cover
16 of the early commercial version and --

17 Q. At the bottom?

18 A. This here?

19 Q. No. That's the back.

20 THE COURT: Mr. Pollaro, my recollection is that
21 the questions about the product number, the SKU was
22 objected to and I sustained that objection, I thought,
23 as not relevant.

24 MR. POLLARO: That was before he brought it up
25 after, your Honor.

1 THE COURT: Well, if it was irrelevant before,
2 it's still irrelevant.

3 MR. POLLARO: Your Honor, he referred to it
4 yesterday as a functional addition to the game, and I'm
5 just asking him if he can identify it on this box.

6 THE COURT: Okay.

7 A. Could you do me the favor of showing it to me?
8 I'm sorry, I'm at a loss to find it. I'm sure you know
9 it's here.

10 MR. POLLARO: May I approach.

11 THE COURT: Yes.

12 A. That would help. Oh, wait, is that it? Is that
13 what you're referring to right here, the proof of
14 purchase.

15 Q. Yes.

16 A. I have it now, yes.

17 Q. Can you tell me what that product code is.

18 A. 04000.

19 Q. And what is your understanding, based on your 53
20 years of experience, of what a product code is?

21 A. That would be the number assigned by the
22 manufacturer to this product for recordkeeping
23 purposes, which would also include the number that the
24 retail trade would order against.

25 Q. Okay. Now, in your experience, when do you change

1 a product code?

2 A. You don't change it if you can help it -- I'm
3 sorry.

4 MR. KRUMHOLZ: Your Honor, excuse me.
5 Objection. We're not claiming it's an aesthetic change
6 to this functional piece. Whether they're changing
7 codes or not changing codes has nothing to do with the
8 issues --

9 MR. POLLARO: I'll withdraw the question, your
10 Honor.

11 THE COURT: All right. Thank you.

12 Q. Can you tell me the product code for the 1960
13 version of The Game of Life.

14 MR. KRUMHOLZ: Same objection.

15 THE COURT: Mr. Pollaro, the product codes are
16 not going to decide this case, I can guarantee you
17 that.

18 THE WITNESS: Your Honor --

19 THE COURT: No, no, you don't have to explain
20 anything. Stick to the question.

21 THE WITNESS: All right.

22 Q. We'll switch gears. You can put that aside,
23 Mr. Orbanes.

24 A. Are we done with this for a while?

25 Q. We are done.

1 A. Okay. I'll put this down here out of the way.

2 Okay.

3 Q. Is it common for game inventors to use an
4 independent game agent?

5 A. No. It's uncommon. Game inventors who use agents
6 are typically amateurs who have no real credentials in
7 the industry and are trying to get in and no idea of
8 just what companies' policies are, and they're rather
9 intimidated by the thought. And secondly, amateurs are
10 really not welcome to come directly to game companies
11 because there's been so much -- there's a body of
12 inadvertent litigation that comes from unknowing
13 vendors who think their ideas may have been copied.
14 That's why agents are important to amateurs.

15 There's also a small number of really good
16 inventors, of which Sid Sackson was the perfect
17 example, who rely on an agent because they're just not
18 comfortable selling. Sid was a phenomenal game
19 inventor, but he stammered, he made excuses, he was shy
20 when it came to trying to present his own ideas. I
21 remember it was very frustrating to deal with him on
22 that level. But the agents did that work for him, so
23 they serve that valued purpose.

24 Q. Thank you for that. So did you say it was common
25 for inventors to use game agents? It sounded like you

1 did, and I thought you said no to --

2 A. No. I said if you were a professional who was not
3 comfortable with your sales skills you were, you were
4 benefitted by having an agent; and if you were an
5 amateur who had never really had any contact with game
6 companies before but you thought you had some game
7 ideas an agent was a very help -- was a big help to you
8 to get your ideas in front of companies. Those are the
9 only two reasons to use an agent.

10 Q. Agents typically have better contacts in the
11 industry than designers; correct?

12 A. Those two categories of inventors that I just
13 pointed out benefit from having an agent who has that
14 industry contact, yeah.

15 Q. So you would agree with that statement?

16 A. Restate it, please, so I make sure I'm on the same
17 page.

18 Q. Agents typically have better contacts in the
19 industry than designers; correct?

20 A. No, that's not correct. Most designers have
21 direct contact with companies. Most game inventors do.
22 They don't need an agent; that's my point.

23 Q. Let's -- I don't believe my question was inclusive
24 of that concept. I'm talking about agents versus
25 designers.

1 A. Now, if we're talking about designers, we mean
2 people who actually build prototypes?

3 Q. I would say inventors, inventors, designers,
4 creators --

5 MR. KRUMHOLZ: Objection.

6 A. Let's I think --

7 MR. KRUMHOLZ: Objection.

8 THE COURT: Well, first of all, you need to not
9 talk over each other.

10 What's your objection?

11 MR. KRUMHOLZ: He just has now lumped inventors,
12 designers, creators.

13 THE COURT: Okay. I think that is going to get
14 clarified. Start your question again, and let's be
15 clear about whether you're talking about an inventor or
16 a designer or a combination of the two.

17 MR. POLLARO: Thank you, your Honor.

18 Q. My question was agents typically have better
19 contacts in the industry than designers; correct?

20 A. Game designers take their marching orders from
21 inventors. That's the second phase of the process in
22 bringing about a prototype. Looks like, plays like,
23 works like.

24 So if you're taking about the plays-like stage,
25 designers are relying on inventors to give the ideas to

1 develop. That's why they're called designers.

2 THE COURT: I think the question was whether
3 agents have better contacts in the toy industry than
4 designers.

5 A. And the answer to that -- thank you, your Honor --
6 would be yes because designers are not inventors. So
7 if the designer had an idea, yeah, he would need an
8 agent.

9 Q. Is it your testimony that designers would
10 typically not be given credit for game designs?

11 A. In that era in particular, yes, never.

12 Q. Never? Game designers never received credit
13 for --

14 A. In that era, no.

15 Q. In that era would game designers receive a
16 royalty?

17 A. They could, sure.

18 Q. They could.

19 A. Yeah.

20 Q. Game agents are able to find opportunities to sell
21 games to game manufacturers; correct?

22 A. Well, that answer requires a little bit of
23 explanation. The average agent could care less about
24 opportunity. They'd simply gather up all the ideas of
25 the inventors they represent and arrange meetings to

1 present them to manufacturers in the hopes that
2 something actually matches up with an opportunity.

3 However, there are a group of very proactive
4 people in the industry who start from the other end.
5 They ask for opportunity first and then they hire
6 designers to create product to match that opportunity.

7 Q. Thank you. And as you recall, we discussed that
8 concept at length at your deposition. Do you recall
9 that?

10 A. I do, yes.

11 Q. And do you recall identifying Reuben Klamer as,
12 you used the term "concept agent"?

13 A. Yes. If you were to try to characterize Reuben
14 Klamer in this scenario, he would not be a passive
15 agent. He would be the one who saw opportunity and
16 then hired designers to fulfill the opportunity.

17 Q. That's your understanding of Reuben Klamer's role
18 in this case; is that correct?

19 A. My understanding of Reuben Klamer's role in this
20 case is that he was at Milton Bradley, was given the
21 opportunity to visit the archive, had the eureka
22 moment, came up with the basis of what The Game of Life
23 would be, and then hired Mr. Markham as the designer,
24 and his team, to design and develop and bring about the
25 fruition of his idea. Yes, that's what I understand.

1 Q. And you understand that, like we were talking
2 earlier, based on the facts that you were assumed to
3 assume (sic)?

4 A. Right. The facts that I was asked to assume on
5 this case, yes.

6 Q. And what you just recited to me regarding Reuben
7 Klamer are some of the facts you were asked to assume;
8 correct?

9 A. That's correct.

10 Q. Game agents do not maintain or have need for staff
11 or employees; correct?

12 A. Typically not, no. I mean Alice Nichols and
13 Felicia Parker had a secretary, so there was three
14 people in that agency.

15 Q. But typically not; correct?

16 A. Typically not, yeah.

17 Q. If a game company adopts a pitched game, then the
18 inventor and the independent agent share in the
19 royalties; correct?

20 A. I'm sorry, what do you mean by "pitched game"?

21 Q. The game that was submitted.

22 A. A submitted game. So say that one more time and
23 use the word "submitted" and I think I can grasp it.

24 Q. Fair enough.

25 A. Okay.

1 Q. If a game company adopts a submitted game --

2 A. Means they licensed a submitted game?

3 Q. Okay. Let me start again. If a game company
4 adopts a license, a submitted game, then the inventor
5 and independent agent share in the royalties; correct?

6 A. Yeah. If an inventor is represented by an agent
7 they will share in the royalties, yes.

8 Q. And based on your experience that would be the
9 case; correct?

10 A. If that's the relationship, that's my, that
11 coincides with my experience, yes.

12 Q. Nothing unusual about that.

13 A. No.

14 Q. I think I have Appendix B, finally, so let's go
15 back and I want to just clarify what you looked at when
16 you initially formed your opinions in this case.

17 A. I see it.

18 Q. Do you recognize this as Appendix B to your
19 opening expert report, December 18, 2017?

20 A. Yes. I mean I take your word for it. I don't
21 actually see Appendix B per se, but I assume this is
22 from it, yes.

23 Q. I will represent to you that it is.

24 A. Okay.

25 Q. And is December 18th, 2017 the first time you

1 formed your opinions in this case?

2 A. It's the date of my report.

3 Q. And would that be the first date upon which you
4 formed your opinions in this case?

5 A. It's the first date that I submitted them, yes.

6 Q. Was there an earlier date that you formed the
7 opinions?

8 A. No; I just worked on this document for quite some
9 time. This was the date of completion.

10 Q. Okay. And now we were starting to talk about this
11 before. We talked about Appendix B at length at your
12 deposition; correct?

13 A. Yeah. Okay. Yes.

14 Q. You made it crystal clear to me that at that time
15 you first disclosed your opinions in December, you had
16 reviewed only the material listed on Appendix B and
17 nothing else; correct?

18 MR. KRUMHOLZ: Objection. Characterizing a
19 deposition and not asking a question.

20 THE COURT: All right. I'll overrule it for
21 now. Go ahead.

22 MR. POLLARO: Thank you, your Honor.

23 Q. Isn't it true that you told me at your deposition
24 that you reviewed the materials on the Appendix B and
25 no other materials?

1 THE COURT: Wait a second. Now I'm going to
2 sustain the objection. If it's just background it's
3 one thing, but that's not a proper approach to using
4 the deposition. You can ask him the question now and
5 if it's inconsistent with what was said at the
6 deposition then you can impeach him with the
7 deposition.

8 MR. POLLARO: Thank you, your Honor.

9 Q. In forming your opinions on December 18, 2017,
10 Mr. Orbanes, did you review the materials identified in
11 Appendix B and only the materials identified in
12 Appendix B?

13 A. Yes.

14 Q. Thank you. Now, if you look on your screen you
15 can see a couple of items with different categories. I
16 want to direct your attention to Item Number 4.

17 A. Production documents?

18 Q. Yes.

19 A. Okay.

20 Q. It looks like there's 21 documents listed there.
21 Do you see that? I'll represent to you there are 21.

22 A. Yes.

23 Q. I'll move it up so everyone can see.

24 A. Yes.

25 Q. And did you review those 21 production documents?

1 A. I did.

2 Q. Can you tell me why -- I'll represent to you that
3 seven of those documents are not cited in your report.
4 Can you tell me, confirm for me that you did, in fact,
5 review all the documents listed in Appendix B?

6 A. Yes, and what are the seven that you're
7 referencing?

8 Q. I don't think it's important. I was just curious.
9 I was curious -- I want to make sure if you didn't cite
10 it in your report but yet it made it on your list that
11 you, in fact, reviewed it.

12 A. I'm sure if it's on this list that I reviewed it.

13 Q. So you reviewed all 21 documents.

14 A. Yes.

15 Q. Okay. Now, if you look at Item 5 there, there's a
16 category called Miscellaneous Sources. Do you see
17 that?

18 A. I do.

19 Q. And those are a few books?

20 A. No. The first one is an article from *Barron's*.

21 Q. Okay. And then there's handwritten notes from a
22 meeting with Mel Taft?

23 A. Yes.

24 Q. And who is Mel Taft?

25 A. Mel Taft was the head of Research and Development

1 at Milton Bradley from the late 1940s to probably
2 sometime in the early 1980s, I would think.

3 Q. And with respect to the handwritten notes, you
4 didn't rely on those notes in forming your opinions?

5 A. No. I disclosed them because I felt it was my
6 duty to disclose them, but I did not rely on them in
7 forming my opinion.

8 Q. Can you tell me why you felt it was your
9 obligation to disclose those handwritten notes?

10 A. Because at that meeting which was specifically on
11 The Game of Life, Mel Taft at Toy Fair that year -- who
12 had rented an office near the Toy Fair -- asked me to
13 consider helping him in developing an electronic
14 alternative to the spinner in The Game of Life. And at
15 that same meeting at the end of it, as a game historian
16 I thought this was a great opportunity for me to ask
17 the man who was there in 1959 how did it come about,
18 because I didn't really know until that point. So I
19 jotted down my notes from Mel, and that's what this is.

20 Q. And just so we're clear, you had a discussion with
21 Mel Taft, the then-president of Milton Bradley;
22 correct?

23 A. No, no, not the president. He was retired at this
24 point.

25 Q. Former president?

1 A. No. He was the former -- he basically had my job
2 at Milton Bradley earlier. He was in charge of
3 research and development. I'm not sure if he was
4 vice president or senior vice president, but he was the
5 R&D leader.

6 Q. And you talked to him about The Game of Life;
7 correct?

8 A. I just asked him out of curiosity, you know,
9 because I'm a game historian and we were talking about
10 The Game of Life. I thought it would be pretty
11 appropriate to get his input.

12 Q. And at the time you wrote your reports did you
13 have the memory of your conversations with Mel Taft in
14 your head?

15 A. Well, I certainly disclosed this, so it was in my
16 head, but I didn't rely on it.

17 Q. You didn't rely it in forming the opinions;
18 correct?

19 A. No.

20 Q. Okay. I just want to show you a couple more items
21 on Appendix B.

22 A. Yes.

23 Q. Do you recognize those publications?

24 A. I do.

25 Q. And isn't it also, isn't it true you're not

1 relying on those publications in forming your opinions
2 as they existed on December 18, 2017?

3 A. You mean in specific in regards to The Game of
4 Life and its origins?

5 Q. Basically -- well, my question would be are you
6 relying on these publications in forming your opinions
7 that are detailed in your expert report and expressed
8 to the Court today?

9 A. Yes. Well, the answer is in the specific book *The*
10 *Toy and Game Inventors Handbook*, I do rely on that
11 because it provides verification of my description of
12 the process required to develop a game from prototype
13 to manufacture.

14 Q. Okay. And so you --

15 A. And also there's a fact in *A Toy is Born* that
16 actually pertains to your question earlier about
17 professional inventors. This author, Marvin Kaye,
18 contemporaneously points out that, I believe, if I
19 remember correctly, that something like 90 percent of
20 all the toys and games that are published come from
21 professional inventors.

22 Q. Okay. So generally I'm hearing that you did rely
23 on --

24 A. Those two, yes.

25 Q. -- those two publications in forming your

1 opinions; correct?

2 A. Correct.

3 Q. Now I'd like to turn to your report, and I
4 apologize in advance; I'm going to try to do this as
5 quickly as possible, but I want to be crystal clear
6 that I understand your testimony regarding the
7 assumptions you made in forming your opinion.

8 I'd like you to turn to page 34 of your opening
9 report. Okay? Do you see paragraph 109?

10 A. I do.

11 Q. Do you see in paragraph 109 where it starts with,
12 (Reading) Klamer provided CPD with instructions for
13 the development of the prototype. He instructed
14 Markham, Chambers, and Israel to, *inter alia*. And then
15 there's A, B, C, D.

16 A. Correct.

17 Q. Now, if you look at paragraph 109 there are no
18 citations to any documents; correct?

19 A. No, there's no citation here.

20 Q. So I just want to make sure I understand that this
21 an assumption that you -- let me start again. Is
22 paragraph 109 a fact that you assumed in forming your
23 opinions?

24 A. This is a fact that I was told to assume.

25 Q. You were told to assume paragraph 109 was as

1 described and formed your opinions based on that;
2 correct?

3 A. That's correct, yup.

4 Q. And did you do any analysis whatsoever to
5 determine whether or not those facts were accurate?

6 A. I was not asked to do that.

7 Q. You were not asked to do that?

8 A. I was asked to assume these facts.

9 Q. And again, maybe I'm stuck on the no, but I'd like
10 to hear you say that you did not do any analysis to
11 determine whether or not those facts were correct. I
12 understand you were not asked to do that, but you
13 understand as lawyers, even though you were asked, not
14 asked, you may still have done it. So I would like to
15 know whether you did or you did not do any analysis to
16 determine whether or not those facts were accurate.

17 A. I did not.

18 Q. I want to identify a couple of other ones so I'm
19 crystal clear these are, in fact, the assumptions that
20 you relied on. Let's turn to paragraph 170. It looks
21 like it's on page 56.

22 A. Okay.

23 Q. And I'll read the sentence into the record because
24 it's short: (Reading) Israel included the descriptive
25 phrase "a full 3-D action game end" beneath "The Game

1 of Life" on the prototype's box.

2 Did I read that correctly?

3 A. Yes.

4 Q. And there's no citation to any evidence or
5 documents; correct?

6 A. No.

7 Q. Again, would this be a fact that you assumed --

8 A. Yes, it would be.

9 Q. -- and formed your opinions based upon?

10 A. Yes, it would be.

11 Q. Okay. And, more generally, obviously you said you
12 spent a lot of time writing this report. To the extent
13 there are other facts such as the two that I've
14 identified that have no citation to evidence, my
15 question to you is are those facts that you assumed to
16 be true and formed your opinions based upon?

17 A. I'm sorry? They're based upon -- go ahead, you
18 better say that again. I don't want to put words in
19 your mouth, Mr. Pollaro.

20 Q. No, fair enough, fair enough. That was probably
21 not a great question.

22 So my question is I've given you two examples of
23 facts that you assumed and based your opinions on;
24 correct?

25 A. Correct.

1 Q. And I'm trying to identify them because they are
2 facts but there are no notations to evidence, and so
3 I'm asking you more generally to the extent your report
4 contains facts with no citations to evidence, is it
5 fair to say that that is an assumption that you made in
6 forming your opinions?

7 A. That would be fair.

8 Q. Thank you. Now my question is then if the Court
9 were to find that your assumptions were incorrect,
10 would you be able to rely on your opinions?

11 A. If the -- I'm sorry, one more time just to make
12 sure I'm clear on what you're saying. Go ahead.

13 Q. So if your Honor determines that your assumptions
14 are incorrect, are your opinions incorrect?

15 A. My opinions would have to change.

16 Q. Would have to change?

17 A. Yes.

18 Q. Okay. And again I apologize for maybe this
19 sounding redundant, but to the extent that there are
20 facts that you assumed, you did no analysis to
21 determine whether the facts were accurate; correct?

22 A. That's correct.

23 Q. And you were not asked to do that; correct?

24 A. No, I was not asked to.

25 Q. So switching gears slightly, or not so slightly.

1 You already testified about the Despicable Me Game of
2 Life. Do you recall that?

3 A. Am I done with this for the moment?

4 Q. You are currently done with that. Thank you.
5 Sorry.

6 A. Okay.

7 Q. I want to talk about your analysis with respect to
8 the Despicable Me Game of Life. Do you recall that?

9 A. I do, from this morning.

10 Q. I believe your testimony was the Despicable Me
11 Game of Life is an independent work.

12 A. Yes.

13 Q. Okay. And my question to you is and -- I'm
14 sorry -- and you compared the Despicable Me to the
15 prototype of The Game of Life; correct?

16 A. That's correct.

17 Q. And that was it? No other versions, no other
18 iterations, no other games in between those games;
19 correct?

20 A. No. It was singular, just that one game.

21 Q. Did you make that determination, or did the
22 lawyers tell you that's the analysis you need to do?

23 A. The attorneys asked me to in specific compare that
24 version to the prototype.

25 Q. You know Reuben Klammer; correct?

1 A. Yes.

2 Q. Would you say that you have a friendly
3 relationship with Reuben Klammer?

4 A. I think I should really help the Court if I point
5 out that the answer to that is I have, I've had an
6 effective business relationship with Reuben Klammer
7 probably beginning in 1984, as I have with probably
8 approximately a hundred professional inventors and 24
9 of whom I would consider to be top inventors, including
10 Reuben Klammer. So I have an effective business
11 relationship.

12 As I mentioned yesterday, your term "business
13 friend" is not a term that I'd used before, but I
14 defined it as an external person with whom I'm
15 comfortable in conducting transactions on behalf of my
16 employer based on prior experience, and in that case
17 Ruben would be among a hundred plus business friends
18 that I have.

19 Q. So you would call him a business friend?

20 A. In that definition. I used your term. It's not
21 one that I've used before.

22 Q. So we're clear, you defined that yesterday for the
23 first time; correct?

24 A. Well, I reflected on your introduction of that
25 term because it's not common in my business. We are --

1 it behooves a person in my position, if you're at
2 Parker Brothers or Ideal Toy in specific, to maintain
3 an effective relationship with all the top inventors in
4 the country because you're in competition with lots of
5 other firms that they're showing ideas to, so it's
6 essential in my capacity that I have an effective
7 relationship.

8 Q. So you wanted an effective relationship with
9 Reuben Klamer; correct?

10 A. Well, yeah, it was my job. If I didn't have
11 effective relationships with this cadre of productive
12 inventors, I would probably be out of a job.

13 Q. Fair enough. And so if I heard you correctly
14 you've used the term "inventor" to describe Reuben
15 Klamer.

16 A. Yes.

17 Q. And previously when we were talking about concept
18 agents you used the term concept agent to apply to --

19 A. No. You were asking me if he went in an agent
20 what type of agent would he be, and so I answered as
21 correctly as I could if he was in that scenario.

22 Q. So is your testimony here today that Reuben Klamer
23 was not a concept agent?

24 A. No. And I'll give you an example. I didn't know
25 Reuben Klamer directly until 1994 when we accidentally

1 met at an industry function. At that time I had just
2 taken over inventor relation responsibilities, thanks
3 to my promotion, and I mentioned to Ruben, as I did
4 many other inventors that, you know, I would be making
5 a trip to southern California and did you have anything
6 to show. And Ruben immediately said to me, What are
7 you looking for? Now, I knew enough from Ruben from
8 the past that I knew he had placed several best-selling
9 toys in the marketplace. I didn't know it at the time,
10 but my sisters, who were younger than me, happened to
11 have some of these toys, so I could connect to them.

12 And I said to Ruben, I'm really looking for
13 something that brings electronics to Nerf and I really
14 need a line of Nerf vehicles; because Nerf originated
15 at Parker Brothers, it was a key brand of the company
16 at the time and we were struggling with how do we grow
17 it.

18 When I saw Ruben a few months later, along with
19 many other inventors in California, he had two working
20 prototypes that addressed those two needs. So that was
21 my first experience with him.

22 Q. That meeting, was that your first meeting with
23 Reuben Klammer?

24 A. At that industry gathering, yes. I didn't have
25 a -- I didn't have any prior personal contact. I'd

1 never been introduced to him before.

2 Q. Can you give me the context when you first were
3 introduced to Reuben Klammer.

4 A. I wasn't introduced to him. We were at an
5 industry -- a cocktail party and we both reached for
6 the same shrimp, and I looked up and --

7 THE COURT: What are we doing here? This is
8 driving me crazy. I mean can't we get through this?
9 What does any of this have to do with anything? Not
10 you, I mean this story, the whole thing? I mean just
11 get -- everybody needs to get focused here.

12 MR. POLLARO: Thank you, your Honor. I
13 apologize.

14 Q. Do you recall yesterday when Mr. Krumholz read to
15 you a letter that you wrote, or an e-mail, sorry, that
16 you wrote to Reuben Klammer?

17 A. Yes.

18 Q. And in that e-mail you described him as engaging,
19 straightforward, clear thinking. You recall that?

20 A. I sure do.

21 Q. And in that e-mail, if I recall correctly, he had
22 provided you a manuscript for his book; correct?

23 A. Two chapters from a book that he was hoping to get
24 published.

25 Q. Okay. So what was your business connection to

1 that book?

2 **A.** I think prior to that topic coming up I hadn't
3 seen or worked with Reuben Klammer maybe in 20 years, so
4 there was no business relationship. Reuben, like
5 several other game inventors, knew I was a published
6 author and thought I might provide him with some advice
7 that would help him to get published.

8 I'm sorry, is there something further that you
9 would like to ask me about that?

10 **Q.** Yes. I'm trying to figure out if you were going
11 to get credit in the book or if you were going to get a
12 portion of the royalties or if you were going to be a
13 co-author.

14 **A.** Oh, no. This was a friendly gesture --

15 THE COURT: So the answer is no. That's all we
16 need. Go ahead. Next question.

17 **Q.** Is it your opinion that Reuben Klammer is honest?

18 **A.** I've always had honorable relationships with
19 Reuben Klammer.

20 **Q.** Is it your opinion that Reuben Klammer is
21 trustworthy?

22 **A.** Yes. This came up in our deposition and I really
23 dwelled on that, and I would say I had no indication
24 that he would not be trustworthy, other than some
25 exchanges of letters in this case where maybe through

1 puffery he had inflated his relationship in the eyes of
2 Milton Bradley vis-a-vis Mr. Markham but which he very
3 quickly retracted.

4 Q. And you discounted those letters based on your
5 personal experience with Reuben Klamer?

6 A. Of course. Everybody has some occasion in my
7 field where there is an attempt to look perhaps a bit
8 more significant than you really are. Why? Because
9 you're working to improve the relationship not just for
10 yourself but for your partner.

11 Q. Have you ever met Leonard Israel?

12 A. I have.

13 Q. When did you meet Leonard Israel?

14 A. On that same trip in 1994 to Los Angeles.

15 Q. Did you discuss The Game of Life?

16 A. When I met him he was --

17 THE COURT: Just the question was did you
18 discuss The Game of Life. That's a yes or no question.

19 A. The answer is no, I did not bring it up. He
20 brought it up.

21 THE COURT: Next question.

22 Q. What did Leonard Israel -- let me rephrase the
23 question. Leonard Israel brought up The Game of Life
24 to you; is that correct?

25 A. No, no, no, no.

1 Q. Did you bring up The Game of Life with Leonard
2 Israel?

3 A. Oh, I'm sorry, obviously he brought it to me. Do
4 you mean did he bring up The Game of Life?

5 Q. Did he discuss The Game of Life with you?

6 A. In that conversation when I was trying to get to
7 know just who are you, one of the things that I asked
8 him is what have you done that I might know? And he
9 was there with his partner Perry Grant and he said in
10 specific, I did the box cover for The Game of Life.

11 Q. I'm not trying to cut you off, but I think we want
12 to move along, so I just want to know if you discussed
13 The Game of Life. I don't really want to know what you
14 discussed about The Game of Life, quite frankly. I
15 just want to know -- I'm not going to instruct you how
16 to answer, but specifically I'm asking if you discussed
17 The Game of Life with Leonard Israel when you met with
18 Leonard Israel.

19 A. Yes. He brought it up, and I listened.

20 Q. But you did discuss it; correct? I don't care
21 what the content was, but you did discuss The Game of
22 Life and the creation of The Game of Life with Leonard
23 Israel when you met him in --

24 A. Not the creation of the game. Just the box cover.

25 Q. I'm going to show you a demonstrative. Switch

1 gears.

2 MR. POLLARO: May I approach, your Honor.

3 THE COURT: Yes.

4 Q. Mr. Orbanes, I want to ask you about your company,
5 Winning Moves. Now, can you tell me when the company
6 was formed?

7 A. I believe we started business in January of 1995.

8 Q. And can you tell me who the founding shareholders
9 were of Winning Moves in 1995.

10 A. There were five: Tom Kramer, who I mentioned
11 yesterday, K-r-a-m-e-r, Alex Randolph, Michael Meyers,
12 Philip Orbanes, and Hasbro.

13 Q. Those were the founding members of Winning Moves?

14 A. That's correct.

15 Q. And can you tell me how Winning Moves was funded
16 when it was founded?

17 A. Yes. The concept that Mr. Kramer came up with was
18 that in return for seed capital we would associate
19 ourselves with one of the major toy or game companies
20 and provide new product ideas that would be proven out
21 through specialty retailing to that partner, making
22 them available for that partner to consider licensing
23 from us to take into the mass market.

24 Q. And did that seed funding come from Hasbro?

25 A. It did.

1 Q. Were there any other seed funding funds received
2 at Winning Moves?

3 A. Not initially, but more capital was raised as time
4 went on.

5 Q. As time went on.

6 A. Right. Not initially. I mean we the founders
7 all, of course, put money into the Winning Moves to
8 establish Winning Moves.

9 Q. So based on my understanding -- well, let me ask
10 this question. Can you tell me, tell the Court why you
11 refused to produce documents that would let me
12 determine the financial details of Winning Moves?

13 MR. KRUMHOLZ: Objection. There's a -- they
14 have raised in their motion papers for the first time a
15 discovery dispute which involves whether or not Hasbro
16 has a duty to turn over documents that Winning Moves
17 possesses, even though it is a minority shareholder
18 with no management control, no day-to-day operations.
19 This is a witness who had never received a subpoena,
20 has no control of Winning -- this is a discovery
21 dispute that he's asking the witness to be opining
22 about that we've briefed in our papers.

23 THE COURT: All right. Why is it appropriate
24 for him to testify about what's effectively a discovery
25 dispute between counsel?

1 MR. POLLARO: Well, I would not characterize it
2 as effectively a discovery dispute between counsel, but
3 we have provided a subpoena to Mr. Orbanes and we have
4 not received that information, and therefore I'm having
5 to ask him these questions versus just having that
6 information, and so that's why I'm setting up this line
7 of questioning.

8 MR. KRUMHOLZ: And I should correct myself. He
9 did receive an individual subpoena, but there was never
10 a subpoena issued to Winning Moves, it was just him
11 individually, so I misspoke.

12 THE COURT: All right. Isn't the important
13 thing for you that you want to establish is the
14 financial relationships; right?

15 MR. POLLARO: Yes, your Honor, but I want to be
16 crystal clear that I don't have the documents that I've
17 requested. The relationship, the financial
18 relationship was not disclosed until his deposition so,
19 you know, whether there was a subpoena sent before
20 that, well, would never have happened because other
21 than the deposition subpoena. So all this has
22 transpired since his deposition when we first found out
23 that Hasbro was affiliated with Winning Moves.

24 MR. KRUMHOLZ: No. First of all, we disclosed
25 it in his report in December, that Hasbro had a

1 financial interest. Specifically as soon as we found
2 this out and we disclosed it in his report
3 specifically, so they took the discovery they wanted.
4 They knew way before that that Winning Moves had been
5 licensing Hasbro products, including The Game of Life.
6 They at that time asked for the license agreement,
7 which we provided. They asked for financial data with
8 regard to sales of Winning Moves -- I mean for the
9 licensing for Winning Moves, and we provided that.

10 We provided everything that Hasbro has.
11 Mr. Orbanes has provided everything that he has. If
12 there was a real dispute here, if they really wanted
13 something they could have long ago subpoenaed Winning
14 Moves to get these records, but this is just something
15 that came up in their motion *in limine*.

16 THE COURT: Let's go off the record for a
17 minute.

18 (Discussion off the record)

19 (Recess)

20 THE COURT: You have until 12:30. Go ahead.

21 MR. POLLARO: Thank you, your Honor. May I
22 approach.

23 THE COURT: Yes.

24 Q. Mr. Orbanes, have you had a chance to review my
25 terribly-created demonstrative? I apologize for the

1 ugliness of it, but I would like you to look at it and
2 let me know if there's anything, based on the
3 information that I have, that is inaccurate.

4 A. It's a good chart, and the only thing that's
5 missing is that Mike Meyers is the Chairman of Winning
6 Moves.

7 Q. Chairman. Thank you for that. And so if we look
8 at the Board of Directors, there are only three members
9 of the Board of Directors; correct?

10 A. That's correct.

11 Q. And you are on that board, and it looks like your
12 son is on that board; correct?

13 A. That's correct.

14 Q. On the ownership side, you told me you had
15 30 percent ownership. Is that still correct?

16 A. All the percentages are accurate.

17 Q. So now let me ask you this. For the 41 that I
18 don't know about, are you the largest shareholder?

19 A. The other 41 is owned by six employees of the
20 company.

21 Q. Okay. So are you largest shareholder of Winning
22 Moves?

23 A. Yes, I am.

24 Q. Can you tell me the largest ownership percentage
25 of the remaining six employees that you just referred

1 to? Ballpark number.

2 A. I can't off the top of my head. Probably about
3 even between them, maybe. If you take 41 and you
4 divide it by six you get seven for an average.

5 Q. Okay. That's pretty good. So then I guess my
6 question would be is Hasbro the second largest
7 shareholder?

8 A. Hasbro is.

9 Q. Okay. Now, does Winning Moves have a license to
10 sell The Game of Life?

11 A. It has a license to sell the 1960 version of The
12 Game of Life, that is correct.

13 Q. The one that looks like these five games that
14 we've been talking about?

15 A. Yes.

16 Q. What is Winning Moves' revenue for the sales of
17 the 1960 Game of Life? Is that accurate on my --

18 A. Well, it's accurate for last year, but it won't be
19 accurate for this year.

20 Q. So it's accurate for last year, so you sold
21 \$500,000 worth of The Game of Life last year in 2017?

22 A. Yes.

23 MR. POLLARO: And I'll let Josh handle that.

24 Q. Winning Moves received last year, derivatives last
25 year for Winning Moves were approximately \$900,000; is

1 that correct?

2 A. No, no. That's not the revenue. That's the
3 profit number I gave you.

4 Q. Sorry; I misspoke. The profit numbers; correct?

5 A. Yes.

6 Q. If Winning Moves lost the license to The Game of
7 Life, would it lose the revenue associated with the
8 sale of The Game of Life?

9 A. Well, the profit number for Winning Moves based on
10 the sales forecast this year would go down by \$30,000.

11 Q. Did I just hear you correctly that you went from
12 \$500,000 in 2017 to projecting 30,000 next year?

13 A. No. We're projecting \$300,000 this year because
14 Hasbro has licensed our closest competitor to make a
15 comparable version of the 1960 Game of Life. We don't
16 have an exclusive. The only difference between us and
17 the one that's made by Winning Solutions, whose name is
18 even confusing and who Hasbro put in business as well,
19 is the box. So our revenue, when we learned this last
20 month at Toy Fair, the projection for sales of this
21 item came down by 36 percent.

22 Q. Did you personally sign the license to the
23 copyrights in suit?

24 A. No, no, did I -- to the what?

25 Q. To the copyrights in this case.

1 A. I signed the license for The Game of Life.

2 Q. The one you've been referring to, the 1960 Game of
3 Life that when you --

4 A. I believe I signed that --

5 THE COURT: Don't talk over each other. Answer.

6 A. I believe I signed that in 2012 while I was still
7 president of the company.

8 Q. And pursuant to that license Winning Moves sells
9 the 1960 version of The Game of Life; correct?

10 A. I believe we began to sell it in 2013 about the
11 time that I retired.

12 Q. Okay. You currently sell The Game of Life
13 pursuant to that license; correct?

14 A. Yes, Winning Moves currently does.

15 MR. POLLARO: Your Honor, I have no further
16 questions, as long as you don't give my time to Josh,
17 or Mr. Krumholz.

18 THE COURT: I won't. I promise.

19 REDIRECT EXAMINATION BY MR. KRUMHOLZ:

20 Q. Good afternoon, --

21 A. Yes, it is afternoon.

22 Q. -- Mr. Orbanes. I want to clarify a little bit
23 your testimony with regard to inventors, designers, and
24 developers. Okay?

25 A. Yes.

1 Q. Do you recall explaining yesterday your views that
2 Mr. Klamer was acting as an inventor and Mr. Markham's
3 company was acting as designer and developer?

4 A. Yes.

5 Q. And you explained to the Court at least based on
6 your experience how those relative roles typically
7 handle the control of the project and the economic risk
8 for the project?

9 A. Yes.

10 Q. So I just want to explore with you a couple more
11 facts and see how that supports or doesn't support the
12 views you gave yesterday with regard to Mr. Klamer
13 being the inventor and assuming control and economic
14 risk versus Mr. Markham not doing that because he was a
15 designer and developer. Okay?

16 A. Uh'huh. Yes.

17 Q. And I'd like to refer you to the assignment
18 agreement, which is JTX2 and a couple of provisions
19 I'll use the ELM0 for.

20 You recall there were questions with regard to
21 credits.

22 A. Yes.

23 Q. And you had some discussion about what was
24 accepted in the industry and not with regard to credits
25 back in the day.

1 A. Yes.

2 Q. So this is page 5 -- page 4, excuse me, of the
3 assignment agreement and it's got a provision on
4 credits, and I want to read it aloud and ask you if
5 that's consistent or inconsistent with the conclusions
6 you've otherwise drawn. It says, "Link shall request
7 the manufacturer to display the name of Bill Markham as
8 designer on the package in which the game is sold, and
9 if approved by the manufacturer will include the fact
10 that Bill Markham is the designer of the game in all
11 publicity releases made and controlled by it."

12 The fact that Mr. Markham negotiated that Link
13 Research requested he be identified as the designer, is
14 that inconsistent with your opinion that, in fact,
15 Mr. Markham was playing the role of a designer?

16 A. No. It's consistent.

17 Q. To carry this over a little bit, if we look at
18 paragraph three, that's Design Changes, and it says,
19 "Markham recognizes the right of the manufacturer to
20 make design changes in the game and its component
21 parts. However, he desires to learn of any changes
22 that may be contemplated" --

23 MR. POLLARO: Objection, your Honor. This is
24 beyond the cross.

25 THE COURT: I don't think it is. Go ahead.

1 Overruled.

2 MR. KRUMHOLZ: Thank you.

3 Q. "However, he desires to learn of any changes that
4 may be contemplated and the reasons therefor in order
5 that he may communicate such ideas as he may have in
6 that regard to the manufacturer. To that end Link will
7 notify the manufacturer of Markham's desire and Link
8 will advise Markham of any information it may receive
9 concerning contemplated design changes, it being
10 understood that" -- great drama because it's this part
11 that I want to get to -- "the final decision regarding
12 such changes shall rest with either Link or the
13 manufacturer."

14 A. Yes.

15 Q. Okay. Is that language consistent or inconsistent
16 with your view that Mr. Klamer was acting as the
17 inventor here and keeping control and bearing economic
18 risk?

19 A. It's consistent with that.

20 Q. How so?

21 A. Because all of the approvals required for any
22 suggestion that Mr. Markham may have come up with was
23 subject to Mr. Klamer's approval and/or Milton
24 Bradley's approval.

25 Q. Okay. Now I'm going to show you the royalty

1 provision from that agreement, and in the second
2 sentence -- well, let's do it for completeness. It
3 says, "For his design and development of the game," in
4 the first sentence, "Link hereby assigns to Markham
5 30 percent of the total royalties to be received by it
6 from the manufacturer and sale of the game. Upon
7 execution of this contract, Link will pay to Markham,
8 receipt of which is hereby acknowledged, the sum of
9 \$3196.21, which represents a reimbursement to Markham
10 of his cost for the model in the sum of \$2,423.16, and
11 the further sum of \$773.05 representing 30 percent of
12 the balance of the \$5,000 deposit received."

13 In your experience is it consistent or
14 inconsistent that Link and Mr. Klammer would be assuming
15 the economic risk if indeed he agreed to
16 unconditionally pay the cost as set forth in this
17 agreement?

18 A. No. This is proof of it.

19 MR. POLLARO: Objection.

20 THE COURT: Overruled.

21 Q. You can answer.

22 A. I said this is proof of that work-for-hire
23 relationship.

24 Q. How so?

25 A. Because it's unconditional that the cost

1 associated with Mr. Markham's efforts of his company is
2 reimbursed, and nowhere in here does it say as a
3 consequence of having received a royalty advance; but
4 it further mentions that of the balance of the royalty
5 advance, Mr. Markham will then in addition get his
6 30 percent of that remainder, which is consistent with
7 the agreement.

8 Q. I'm going to hand you -- I'm not going to hand
9 you -- I'm going to show you what is previously
10 admitted as JTX46, --

11 A. Uh'huh.

12 Q. -- and this is a letter from Mr. Taft.

13 A. Yes.

14 Q. And you understand him to be the Taft we've been
15 talking about from Milton Bradley.

16 A. Yes, the one I meant.

17 Q. And it's to Mr. Klammer dated August 29, 1960.

18 A. Right.

19 Q. In the first paragraph he says -- it's not
20 terribly focused, go back -- "The comments which we
21 received for possible improvement on The Game of Life
22 from Bill Markham were helpful, but in view of some of
23 the comments that we are receiving from friends and
24 general consumers who have bought the game, it seems to
25 show that we need even further improvements; therefore,

1 since you are as much interested in making a staple of
2 this item as we are, I am writing at this time to see
3 if you people have any suggestions that would correct
4 the following," and then he goes on to list various
5 questions that he has or concerns he has.

6 Is Mr. Taft's requesting that help from
7 Mr. Klamer consistent or inconsistent with your views
8 that he was the mentor that bore the economic risk and
9 retained control?

10 A. Well, it's consistent, and I've done much the same
11 with inventors myself when we --

12 THE COURT: You answered. It's consistent.
13 That's all we --

14 THE WITNESS: I'm sorry, sir.

15 Q. Well, okay. With the Court's permission, can you
16 explain why you believe that it's consistent.

17 THE COURT: Go ahead.

18 A. The answer it's consistent is because I know from
19 experience with many inventors over the years that if
20 there's some hiccups in the acceptance of the game
21 after it's first published they may want to offer
22 suggestions but they could be insignificant compared to
23 larger issues, and you have to bring that to their
24 attention, and you say, well, don't worry about the
25 colors or the inclusion of a few more words of game

1 board; you have to change the whole thinking that you
2 have right now from one of a game of chance to one of a
3 game of skill, so give me your ideas on how to make the
4 game different.

5 Q. Let me ask you one more question. I want you to
6 assume that Mr. Klammer testified that when Milton
7 Bradley encountered trouble getting the game from
8 prototype to commercial product, they reached out to
9 him and he visited Milton Bradley to help them solve
10 their problems. With that, if you assume that to be
11 true would that be consistent with Mr. Klammer playing
12 the role of the inventor that assumed the economic risk
13 and retained control of the project?

14 A. Yes, that's consistent.

15 MR. KRUMHOLZ: I have nothing further, your
16 Honor.

17 THE COURT: Thank you. Since you didn't use all
18 your time, Mr. Pollaro, I'll give you just a couple of
19 minutes if you want it for recross on any of those
20 topics.

21 MR. POLLARO: Thank you, your Honor.

22 RE CROSS-EXAMINATION BY MR. POLLARO:

23 Q. I have one question. Hopefully I'll be very
24 brief, very brief.

25 MR. KRUMHOLZ: I still have that letter up there.

1 Sorry.

2 Q. This is from the same agreement that Mr. Krumholz
3 was just showing you. I want to direct your attention
4 to number 3, and I'll read it into the record: "At the
5 request of Link, Markham has invented, designed, and
6 developed a game tentatively known as The Game of Life,
7 hereinafter called The Game, which Link has licensed
8 for manufacture and sale to the Milton Bradley Company
9 of Springfield, Massachusetts."

10 Do you see that?

11 A. I do.

12 Q. Is this statement consistent or inconsistent with
13 your view of Bill Markham's role in The Game of Life?

14 A. It's consistent. I can't tell you what was going
15 through the minds of Mr. Klamer and Mr. Markham when
16 they put those terms or labels into the agreement. I
17 can only tell you how those three terms are applied in
18 the industry, and in the industry definition of the
19 word "inventor" Mr. Markham would not be the inventor.

20 MR. POLLARO: No further questions, your Honor.

21 THE COURT: Okay. Thank you.

22 Mr. Orbanes, you may step down. Thank you very
23 much.

24 THE WITNESS: Thank you, your Honor.

25 THE COURT: Defense rests?

1 MR. KRUMHOLZ: We do, your Honor, subject to the
2 deposition designations.

3 THE COURT: Right, subject to the deposition
4 designations. Okay.

5 And I just want to be clear; none of the other
6 Defendants have any evidence. Is that correct?

7 MS. VAN LOON: We rest, your Honor.

8 MR. JINKINS: We rest, your Honor.

9 THE COURT: Let's go off the record for a
10 minute.

11 MR. POLLARO: Your Honor, sorry, your Honor, I
12 would like to make a motion for a directed verdict
13 judgment as a matter of law.

14 THE COURT: I should ask you before you do that,
15 I take it you do not have any rebuttal evidence.

16 MR. POLLARO: We do not have any rebuttal
17 evidence.

18 THE COURT: So go ahead, make the motion.

19 MR. POLLARO: The Markham parties, respectfully,
20 have proven their third claim for relief. The
21 Defendants have failed to prove any defense. Evidence
22 or contemporaneous documents is all in agreement that
23 Bill Markham was the sole physical creator of The Game
24 of Life. Evidence includes the assignment agreement,
25 Bill Markham's testimony that he already had a game in

1 the works, and the 1965 letters. The only evidence to
2 the contrary is modern evolving testimony by
3 inconsistent and biased witnesses.

4 The Markham parties, as his heirs, have a right
5 of termination, not a work-for-hire for Klamer, because
6 Bill Markham reserved his rights. Bill Markham was not
7 an employee, and the expense test, to the extent it
8 applies, was not met. Not a work-for-hire by Bill
9 Markham employees because no credible evidence that he
10 did anything creative on the actual game, no Game of
11 Life products or derivative works. The evidence shows
12 all changes are not the agreement.

13 Thank you, your Honor.

14 THE COURT: Let's go off the record for a few
15 moments.

16 (Discussion off the record)

17 THE COURT: First I'll put on the dates that are
18 agreed to. The parties have agreed to file post-trial
19 briefs with proposed findings of fact and conclusions
20 of law by -- what was the date again?

21 MR. KRUMHOLZ: April 12th, your Honor.

22 THE COURT: April 12th, and with a page limit of
23 briefs not in excess of 30 pages; correct?

24 MR. KRUMHOLZ: Yes.

25 THE COURT: All right. And then replies --

1 MR. KRUMHOLZ: May 4th.

2 THE COURT: -- will be filed by May 4th, and
3 oral argument will be May 10 at 10:00 a.m.

4 MR. KRUMHOLZ: And the reply is not to exceed
5 15 pages.

6 THE COURT: And the reply is not to exceed
7 15 pages. Okay. Very good.

8 All right. Let me throw a couple things out
9 that I'm not entirely clear on and let you just give me
10 your thoughts or arguments on them. So I guess the
11 first point is if I were to conclude that Hasbro is
12 correct that Markham and Klamer are either joint
13 authors or that Markham and/or Mr. Israel and Ms. Falco
14 created the prototype on a work-for-hire-basis, then
15 you're in agreement, I take it, that the Section 304(c)
16 does not allow for termination of the assignment.

17 Is that something you agree on, assuming that I
18 were to find that?

19 MR. POLLARO: Your Honor, if I may, the only
20 issue with that, if it's a work-for-hire for Bill
21 Markham, I believe we agree that there would be no
22 termination rights. However, you started that question
23 off with the joint authorship between Klamer and Bill
24 Markham and obviously I mean that's --

25 THE COURT: I guess I was giving you two

1 scenarios, one was joint authorship, one was
2 work-for-hire; but in either case, if I understand
3 Hasbro's position to be there's no right of
4 termination.

5 MR. POLLARO: Again, you know, without getting
6 too much in the weeds, Mr. Klammer has abandoned any
7 joint authorship argument by making clear that he made
8 no physical contributions. Joint authorship requires
9 physical contribution and that's off the table, as far
10 as we're concerned. That's the only point I'm making.

11 THE COURT: But they don't agree with that.
12 That's just your argument. Well --

13 MS. VAN LOON: Right, we do not agree with that.
14 That is still in play.

15 THE COURT: I understand you all disagree on
16 lots of things here, but I'm just trying to clarify if
17 you assume certain things, okay, just like with the
18 experts, all right? If you assume either one of those,
19 then there's no right of termination.

20 MR. KRUMHOLZ: I would modify the joint
21 authorship a little bit and deal with the caveat that I
22 think we have to look at it, and I'm not a hundred
23 percent on this, but I would say on the joint
24 authorship Mr. Markham could terminate to the extent of
25 his interest, but he can't obviously terminate

1 Mr. Klamer's interest so Hasbro and Mr. Klamer could go
2 on unimpeded. He may then have independent rights,
3 having terminated his transfer, that would impact the
4 relationship, it would impact Hasbro's rights with
5 Mr. Klamer's rights any other way.

6 MR. POLLARO: Your Honor, if I may, I tend to
7 agree with that. The joint authorship, it is a little
8 more complicated, as Mr. Krumholz pointed out.

9 THE COURT: All right. So then let's take that
10 example. Let's assume that that is what I find. Then
11 you say Markham could terminate the assignment to the
12 extent of his interest. How does that get figured out?
13 I mean what is that?

14 MR. KRUMHOLZ: Well, that would mean that they
15 would have coextensive rights, Mr. Klamer and
16 Mr. Markham. So he can, as a practical matter he stops
17 potentially getting any royalties because he's
18 terminated the assignment agreement, but he in theory
19 could go off and find somebody else that might be
20 interested in licensing those copyrights, whatever
21 likelihood of success he may have, but from Hasbro's
22 and Mr. Klamer's standpoint we go on as we always have
23 before, you know, there's a license agreement in place
24 and life goes on.

25 THE COURT: Okay. So your point, your position

1 would be the effect of that would be termination of any
2 royalty stream that currently exists --

3 MR. KRUMHOLZ: To Mr. Markham.

4 THE COURT: -- to Markham.

5 MR. KRUMHOLZ: Yes.

6 THE COURT: But a right to license the
7 production to some other --

8 MR. KRUMHOLZ: The right to license the
9 copyrights, how far that extends. I wouldn't say
10 production because there's a lot more IP in the product
11 than just the copyrights.

12 THE COURT: Okay, to the copyrights. And then
13 that leads to another question which is then, which
14 overlaps to some of my other questions, what is that,
15 that right, that copyright right? What is it?

16 MR. KRUMHOLZ: Well, from our standpoint it's a
17 *de minimus* thing because we don't know what the actual
18 materials are that are the subject of the copyright
19 registration. But if we assume that it's some
20 commercial version, you know, there's some expression
21 in there that they otherwise may be able to license to
22 somebody else and have them use that expression in the
23 same way that, for instance, Winning Moves is. But
24 they could not, for instance, use The Game of Life
25 because that's a trademark owned by Hasbro.

1 This is, at the risk of digressing a little,
2 this is I think a little bit of what we were getting
3 into when you were raising potential questions about
4 the license agreement and how that impacts or plays
5 into the copyright interest.

6 THE COURT: And I want to get to that in a
7 minute, but go ahead.

8 MR. KRUMHOLZ: So I was going to get to that
9 now.

10 THE COURT: Go ahead.

11 MR. KRUMHOLZ: So I don't think there's any
12 dispute that Mr. Markham's company played a role in
13 creating some intellectual copy. Copyright issues
14 aside, that would probably be best described as a trade
15 secret, and in fact when we see the kind of disputes
16 between companies and inventors it's usually a trade
17 secret claim, some idea is disclosed under a
18 confidential arrangement and then you ever the legal
19 principles that flow from that.

20 So when Mr. Klamer signed the license agreement
21 with Milton Bradley he certainly did need to get an
22 assignment of whatever IP Mr. Markham's company owned,
23 and we know there was IP because they later both
24 mutually applied for a patent, which was allowed.

25 So, you know, broadly speaking there was IP that

1 was created by Mr. Markham's company that needed to get
2 assigned to Link Research so that it had all full
3 rights and interest that it could license to Milton
4 Bradley.

5 But what we're dealing with is a sliver of the
6 umbrella or penumbra of potential IP rights. So the
7 issue here of course is, the threshold question is did
8 Mr. Markham or his company have any copyright rights
9 that were created through the work that they did;
10 right? If that is the case then we have all these
11 waterfall questions, the work-for-hire, et cetera.

12 THE COURT: Uh'huh.

13 MR. KRUMHOLZ: So when we get to the reservation
14 of right question and you look at Section 4, I think,
15 of the agreement, it's a very broad -- you know, to the
16 extent that you, Mr. Markham, somewhere down the road
17 at our request file a copyright, seek a patent, seek a
18 trademark application, you have to assign it to Link
19 Research, and then down the road as the agreement
20 terminates that application will revert back.

21 It doesn't say anywhere in the agreement what
22 Mr. Markham's IP interests are, whether he has any, and
23 if he does what the extent are. It is just the
24 hypothetical future behavior, which never took place.

25 THE COURT: Okay. I think you're getting,

1 you're sort of getting afield --

2 MR. KRUMHOLZ: I may be.

3 THE COURT: -- of what I want to know about
4 right now, so let me just keep on with my series of
5 questions.

6 So back to the joint authorship scenario, then I
7 think everybody agrees that generally what you
8 expressed would happen if on the Markham side and on
9 the Klamer and Hasbro side you said life would just go
10 on as is; right? So there wouldn't be any change on
11 that side.

12 Backing up to the work-for-hire scenario, I
13 think everyone agreed that if I found it were a
14 work-for-hire either at one level or two levels with
15 respect to Markham and/or Markham employees, Israel and
16 Falco, that that would end the inquiry because there's
17 no right to terminate the assignment so the assignment
18 agreement continues as it is right now. Right?
19 Everybody is in agreement on that?

20 MR. KRUMHOLZ: Yes.

21 MS. VAN LOON: And just one further thought.
22 Also, if the commercial version is deemed to be
23 derivative work, then that also cuts off the right of
24 termination.

25 THE COURT: Right. I'll get to that in a

1 minute, okay? But I don't -- so since you brought that
2 up, so I don't need to get to the issue of derivative
3 works unless I find that it's not joint authorship or
4 not work-for-hire, and then I go on this analysis, this
5 derivative work analysis; right?

6 MR. KRUMHOLZ: Yes.

7 THE COURT: Everybody agrees on that?

8 MS. VAN LOON: Yes.

9 THE COURT: If I get to the derivative work
10 analysis, then one thing that is very confusing to me
11 is, I mean I could rule in a variety of ways; but just
12 assume for a minute that I find that in the early
13 versions of the game there are some expressions that
14 are derivative, that the early versions of the game are
15 not independent, they maybe are minor expressions that
16 are created and therefore derivative, but there are
17 many aspects of the game that are the same as the
18 prototype. Does any of that matter, or does it only
19 matter as to what the current version of the game and
20 the Despicable Me version of the game is, whether it's
21 independent or derivative?

22 And the reason I'm asking is I assume that the
23 real money here is in the royalties of the current
24 version that flow from the sale of the current versions
25 of the game, that these old versions of the game aren't

1 in the market, except maybe with respect to companies
2 like Winning Moves that might be selling them to
3 collectors or something.

4 MR. KRUMHOLZ: It's certainly true that the
5 lion's share of the money is in the modern version of
6 the game; but from Hasbro's standpoint they are still
7 licensing it, you know, in two different companies, the
8 classic version of the game, and they would want a
9 ruling from the Court that in our view it's a
10 derivative work and therefore we can continue to sell
11 that product under the termination statute --

12 THE COURT: Well, what if it's not totally a
13 derivative? I mean I guess that's my question. Is
14 something --

15 MR. POLLARO: No, no.

16 THE COURT: Does something have to be completely
17 derivative? Do I look at it as a totality, or are
18 there aspects of it? There's the board, there's the
19 cover, and then there are a whole variety of things
20 within that, and some of them seem derivative and some
21 of them seem not.

22 MR. KRUMHOLZ: I think we're using the terms a
23 little incorrectly here, because the definition of
24 derivative work, it has two components to it. It has
25 work from the original work, --

1 THE COURT: Yes.

2 MR. KRUMHOLZ: -- so it carries over some of the
3 same work, but it also has some modicum of originality
4 that's been added to it. So if it has both of those
5 components it would be deemed a derivative work because
6 it derives from the first work, but it has some
7 differences to it. As opposed to being the same work,
8 where everything would be the same and there would be
9 no differences. And under the termination statute, you
10 know, just a policy judgment that was made to balance
11 out these interests, that if a derivative work was
12 created prior to the termination of the transfer of the
13 copyright, then the company that licensed it, that
14 created it, that derivative work, could continue to use
15 it. They could continue with all derivative works that
16 they already created.

17 The restriction under the statute is that they
18 can't create any more or new derivative works, which is
19 why we also for these other works have asked for a
20 finding that these other works are indeed independent
21 works. That would give us guidance going forward in
22 this, in our view worse case scenario, of what
23 constitutes an independent work in the eyes of the
24 court so that we avoid creating future derivative
25 works.

1 THE COURT: All right. So is it possible -- do
2 you agree with that?

3 MR. POLLARO: I mean I guess I thought your
4 question was slightly more directed to what's the
5 difference between what the derivative work will cover
6 versus what the original work covers, and we tried to
7 talk a little bit about that today with the witness.
8 But to the extent there are any changes that are deemed
9 to be made that are creative and turned into derivative
10 work, the right there would be only to that delta, to
11 that very small --

12 MR. KRUMHOLZ: No, that's completely wrong on
13 your point.

14 THE COURT: All right. That is part of what I'm
15 getting at, and if you're right about that that seems
16 like a very confusing -- I don't know what I would, how
17 would figure that out.

18 MR. POLLARO: I mean --

19 THE COURT: Let me take a more blatant example
20 and talk to me about this. So let's say that the, so
21 you have the board and you have the cover, okay, let's
22 say hypothetically, okay, say I concluded that the
23 cover was a derivative work or say I concluded the
24 cover was independent but the board was still the same
25 game. How do you deal with that? Is it one work, or

1 are they separate?

2 MR. KRUMHOLZ: There are three registrations,
3 one for cover, one for rules, one for board, so --

4 THE COURT: Could it can be different
5 conclusions for each.

6 MR. POLLARO: Yes.

7 MR. KRUMHOLZ: Right. Now, you can easily
8 conclude that one cover is one thing and for that same
9 game one board is something else, and we would, you
10 know, have to deal with whatever that is.

11 THE COURT: Okay. So just hypothetically what
12 if a conclusion is different as to those three things?
13 How does that play out?

14 MR. KRUMHOLZ: For instance, if you concluded
15 that the 1960 cover was the same, the board was
16 derivative, the rules were independent, so -- and we're
17 assuming the scenario that you have ruled against
18 Hasbro on these other pieces, --

19 THE COURT: Yes.

20 MR. KRUMHOLZ: -- we couldn't use the cover
21 anymore. That's the same work, so that gets pushed to
22 the side. We just couldn't use it.

23 The derivative board we could continue to use in
24 its totality. It's not just the things that we added,
25 that would make no sense because we don't need a ruling

1 about the things we added. That didn't come from them
2 to begin where. The way the law has shaped this
3 balancing is that, okay, you, you know, author/creator,
4 after 56 years, yes, you have the right to terminate
5 and all that comes with that, but we're going to give
6 some protections to the licensee that whatever work,
7 derivative work they created in the interim they could
8 continue to sell, they just can't make new ones. So
9 it's the entirety of the work. So we could still sell
10 that board game as it is. The rules --

11 THE COURT: Can't make new ones in new
12 derivative works? Is that what you mean?

13 MR. KRUMHOLZ: We can't create a new derivative,
14 so we can't work from the original prototype, so --

15 THE COURT: So you couldn't go out and create, I
16 mean I remember, I've done a lot of Hasbro cases over
17 the years, so you couldn't go out and create Spiderman
18 Game of Life using the Spiderman license.

19 MR. KRUMHOLZ: Not if we're taking it from the
20 prototype. So there still has to be enough similarity
21 from the prototype that you would conclude that it was
22 a derivative work, all right? So this is distinct from
23 if it gets far enough way it becomes independent; so
24 there's no overlapping expression, it doesn't look like
25 the prototype anymore in any substantive meaningful

1 way. So it would, could -- one could easily envision a
2 scenario where you would have to rule on some future
3 work as to whether it's derivative or not or whether
4 it's an independent work. There would be no dispute if
5 it was the same; we just couldn't do it.

6 Does that make sense?

7 THE COURT: Yes. All right. I think that makes
8 sense.

9 Do you want to add anything?

10 MR. POLLARO: I would agree on the flip side of
11 that, which was mentioned before, is the Markham
12 parties could go and do what they do with their rights.

13 MR. KRUMHOLZ: If it's joint authorship.

14 THE COURT: And I also want to understand the
15 current relationship is, if I understand this
16 correctly, that royalties have continued to be paid
17 over all these years on these evolving versions of the
18 game. That original license agreement with Milton
19 Bradley, the parties have continued to function under
20 that even though you're taking the position that really
21 what's being sold on the shelves now is really a
22 completely different game.

23 MR. KRUMHOLZ: And that gets to what I was
24 inarticulately expressing before. The answer is yes,
25 Hasbro is continuing to pay because when you're paying

1 an inventor you're paying for the concepts they brought
2 to the table. So we agree, as you probably can surmise
3 from these days of questioning, we agree that there are
4 still some core concepts and core ideas that date back
5 to 1959 that are still in the game. So Hasbro's -- and
6 because all the IP was licensed, including those ideas,
7 Hasbro still has an obligation to continue paying the
8 royalties, and whether or not who owns the copyright,
9 whoever owns the copyrights will not impact that
10 because there's other IP that's the core ideas and
11 concepts that carry through it and remain.

12 So that's where I think this all got very
13 confusing. I mean I feel like I understand these
14 issues well and I got confused by it. It is this kind
15 of differentiating between ideas and expression. They
16 licensed ideas to us, they're in the product, they're
17 in Despicable Me, in the Despicable Me version, the
18 idea of life events and the spinner and what have you.
19 Those core ideas are still there. But when you get to
20 a copyright question --

21 THE COURT: What governs the idea?

22 MR. KRUMHOLZ: Trade secret.

23 THE COURT: I mean there's trademark. I mean,
24 okay, there's patents. Those are expired; right?

25 MR. KRUMHOLZ: No; it would be trade secret.

1 THE COURT: Trade secret.

2 MR. KRUMHOLZ: Typically, and I've handled many
3 of these for Hasbro, when you get into a dispute
4 between a game manufacturer like Hasbro and an inventor
5 the dispute is usually, hey, I disclosed this game or
6 toy idea to you and now a year later I'm seeing that
7 concept in a toy; you have to pay me. And typically
8 our fight is about whether we used their idea or it
9 came through a third party, all those issues.

10 THE COURT: Right.

11 MR. KRUMHOLZ: But the cause in action is almost
12 always a trade secret claim.

13 THE COURT: Trade secret. Okay.

14 All right. So you continue to live under this
15 royalty agreement for all of these years and it's still
16 generating a lot of money, right, I take it?

17 MR. KRUMHOLZ: Enough to fight about.

18 THE COURT: Enough to fight about. But the
19 result here could terminate that, if I understand you
20 correctly; right?

21 MR. KRUMHOLZ: In our view, no. It would modify
22 it. In the worse case scenario we would be frozen,
23 Hasbro would be frozen selling the products that it has
24 today and be able to create future independent versions
25 of the copyright.

1 See, what's really tricky here and why we keep
2 periodically bringing up the fact they made no attempt
3 to identify the deposit materials with the copyright
4 office --

5 MR. POLLARO: Your Honor, that's not true.

6 THE COURT: You'll be able to respond.

7 MR. KRUMHOLZ: Yeah, that was unnecessary; I
8 didn't mean to cast aspersions.

9 But why the deposit materials are important as a
10 practical matter is, let's assume our worse case
11 scenario and you conclude that there's a termination
12 here, and now Mr. Markham has the right to -- he owns
13 all the rights of the copyright. We're out there
14 selling, you know, any version of the game. They would
15 have to bring an infringement action because now it was
16 unauthorized; right? Okay. If you bring an
17 infringement action you have to show what is the actual
18 copyrighted material, all right?

19 So that's what would happen down the road. So
20 we would be frozen in time. We could sell anything
21 that we have that we've already created. If we create
22 a game down the road, they would have to bring an
23 infringement action alleging that that later version
24 infringes the original copyright, but without the
25 materials I'm not sure how you do that.

1 THE COURT: Okay. I think I understand that.

2 MS. VAN LOON: Your Honor, I just want to make
3 one small point to add to Josh's point. It wouldn't
4 just be a trade secret action, but there would also be
5 a breach of contract action because under the license
6 agreement -- and remember, the license agreement is
7 between Link and Milton Bradley now Hasbro.
8 Mr. Markham was never a party to that agreement. And
9 what that agreement says is that Mr. Klamer has an
10 approval right of all new versions of the game, and
11 because of that every time one of these new versions of
12 the game is added to the line, the original license
13 agreement is amended, and there are several amendments
14 that are, you know, have formed a part of that original
15 license agreement. So it wouldn't just be a trade
16 secret issue; it would be a breach of contract issue as
17 well. I just wanted to clarify.

18 MR. KRUMHOLZ: I wasn't trying to limit their
19 future claims.

20 THE COURT: Right. Okay.

21 Did you want to add to anything he said?

22 MR. POLLARO: If you need, if your Honor needs
23 anything for me to add. I'm not sure -- if you have
24 questions I'm happy to address them from the Markham
25 side.

1 THE COURT: No, I think this is all helpful and
2 I guess that's half of the answer. The other half of
3 the answer is if I rule for Hasbro on either
4 work-for-hire or joint, well, if I rule for Hasbro and
5 find they're joint authors, then the ball is sort of in
6 the Markham parties' court; right? They could do
7 nothing and life could just go on for everybody, or
8 they could exercise, continue with the exercising of
9 the right of termination, to the extent they could do
10 that, and then where it goes from there would be sort
11 of an open question.

12 MR. KRUMHOLZ: They would have the ability to go
13 out on the street with their rights and the copyrights
14 and see if anybody is interested in licensing them.

15 THE COURT: Right. But that would no doubt lead
16 to more litigation and I would think, I mean it's --

17 MR. KRUMHOLZ: Not necessarily, not necessarily.
18 Well, I mean there's also the practical reality whether
19 they can get anybody to bite. But that aside, if
20 that's the way it shakes out, then as long as they're
21 not -- you know, they show up with a game that says The
22 Game of Life on it you're going to have a trademark
23 case.

24 THE COURT: That's what I'm saying. So to make
25 those rights valuable I would think you would have to

1 put a product out in the market that stood a high risk
2 of inviting a trademark or other action. So that's
3 just -- but the Markham parties could also at that
4 point just do nothing and continue to go on with life
5 as it has been; just as that would continue to, that
6 would continue to be the case if I were to determine
7 that they hadn't met the burden of proof and this was
8 work-for-hire; --

9 MR. POLLARO: That's correct.

10 THE COURT: -- right? Okay.

11 All right. I think that those are my questions.

12 MR. KRUMHOLZ: I guess I would invite -- we
13 would be happy if questions came up as you're
14 evaluating all of this to submit or come in for a
15 hearing if that would be helpful.

16 THE COURT: Yes. Well, we can go off the record
17 now.

18 (Discussion off the record)

19 (Adjourned)

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C E R T I F I C A T I O N

I, Denise P. Veitch, RPR, do hereby certify
that the foregoing pages are a true and accurate
transcription of my stenographic notes in the
above-entitled case.

/s/ Denise P. Veitch
Denise P. Veitch, RPR

March 13, 2018
Date